IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-569

NEW YORK SHIPPING ASSOCIATION, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

TWIN EXPRESS, INC.,
Respondent,

and

CONSOLIDATED EXPRESS, INC.,
Respondent,

and

TRUCK DRIVERS UNION LOCAL 807, IBT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, New York Shipping Association, Inc. ("NYSA") respectfully prays that a Writ of Certiorari issue to review the judgment entered in this proceeding by the United States Court of Appeals for the Second Circuit on September 9, 1976.

Opinions Below

In a divided opinion, the Court below affirmed the order of the National Labor Relations Board ("NLRB" or "the Board"). The NLRB's order held illegal certain provisions of petitioner's collective bargaining agreement with the

International Longshoremen's Association, AFL-CIO ("ILA").[1] These contractual provisions, known as the Rules on Containers (the "Rules"), were determined to be outside the protection of the "work preservation" doctrine enunciated by this Court in *National Woodwork Manufacturers Association* v. *NLRB,* 386 U.S. 612 (1967) (hereafter *"National Woodwork"*). In 1970, the identical Rules had been found to be valid work preservation provisions by another panel of the Second Circuit Court of Appeals.[2]

The opinion of the Second Circuit, dated June 29, 1976, has not been officially reported and is set forth in the Joint Appendix (A79-A96). The Board's decision and order, dated December 4, 1975 (A58-A78), and the decision of Administrative Law Judge Arnold Ordman, dated December 9, 1974 (A1-A57) upholding the "Rules" but which was reversed by the Board, are both reported at 221 NLRB No. 144.

Jurisdiction

The majority opinion affirming the Board's order by Senior Judge Wyzanski, of the District of Massachusetts, sitting by designation, was concurred in by Senior Circuit Judge Moore. Circuit Judge Feinberg dissented. A petition for rehearing *in banc* was denied on August 6, 1976 (A98) and judgment was entered September 9, 1976 (A99-A101). This petition for a certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC § 1254(1).

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[1] ILA was also a petitioner in the court below, and is filing a separate petition.

[2] *Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n and International Longshoremen's Ass'n,* 426 F. 2d 884 (2d Cir. 1970) (hereafter "ICTC" case).

Questions Presented

1. Did the court below violate this Court's holding in *National Woodwork* by ignoring the traditional work of the bargaining unit longshoremen—the work in controversy —and focusing instead on the work performed by others outside the bargaining unit?

2. Did the court below violate this Court's holding in *National Woodwork,* and conflict with other Circuit Court decisions, by invalidating collectively bargained provisions preserving to bargaining unit longshoremen certain historical work functions in the loading and unloading of ocean cargo because modern cargo handling techniques, which the union permitted employers to utilize, have enabled others, away from the piers, to perform similar work on the cargo?

Statute Involved

The relevant statutory provisions are Sections 8(b)(4)(ii)(B) and 8(e) of the Labor Management Relations Act of 1947, as amended ("the Act") 29 U.S.C. § 158(b)(4)(ii)(B) and 158(e)—the Secondary Boycott and Hot Cargo provisions respectively of the Act.

Section 8(b)(4)(ii)(B), so far as relevant, provides that it is an unfair labor practice for a union

> "to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an objective thereof is—
>
> > (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any person . . . . *Provided,* That nothing contained, in this clause (B) shall be construed to make unlawful . . . any primary strike or primary picketing;"

Section 8(e) provides that it is an unfair labor practice for a labor organization and an employer

> "to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agrement shall be to such extent unenforcible and void."

Statement of the Case

A. Preliminary Statement

The facts in this proceeding are not in dispute.[3] They involve the container revolution, an innovative technique in cargo handling which drastically transformed the work of the longshoreman. The legal issue—what is the work in controversy?—is relevant to all work preservation arguments seeking the sanction of the *National Woodwork* doctrine.

The particular issue here is whether longshoremen at the piers, employed under the NYSA-ILA collective agreement, may preserve for themselves, a portion of their work jurisdiction, which involves the work of stuffing (packing) cargo into containers.[4] The empty containers are furnished by the ocean carrier employer-members of NYSA and after

[3] The facts were comprehensively determined by the Administrative Law Judge, based upon a 1,500 page transcript, affidavits, and numerous exhibits. The Board reversed his decision since it disagreed with his conclusions. Thus the issue is solely one of law as both the majority and the dissent in the court below recognized (A82 and A92).

[4] The identical issue exists on import cargo as to who shall unpack (strip) the container.

being packed with cargo the containers are transported on that carrier's vessels.

Not in dispute are containers sent to a shipper who loads his goods into them at his facility using his own employees. Those containers have always been permitted to be loaded onto the vessel without rehandling of the cargo by the ILA. However, what is in dispute is the work of stuffing "consolidated" or "LTL containers", the situation where goods of more than one shipper are packed into a single container (i.e., are consolidated). The ILA performed that type of consolidation work at the piers before containerization as well as after and insists that that work continues as part of their jurisdiction. The issue is thus whether the longshoremen have a valid claim to that work or whether one who now consolidates cargo at an off-pier facility using containers supplied by the carriers has a superior right to that work as compared to the longshoremen.

B. The Traditional Work of the ILA

For decades the ILA's jurisdiction encompassed all stevedoring and terminal activities at the extensive waterfront facilities in the Port of New York (29a-82a, 85a-89a, 842a-845a, 982a-85a).[5] The undisputed findings of Judge Ordman described the nature of the longshoremen's work as follows:

> ". . . [V]*irtually all solid cargo moving over the docks* in the Port of New York *had for decades been handled on a piece-by-piece basis by longshoremen and employees in related crafts who worked on the docks and were represented by ILA.* Typically, that work included the preparation of cargo for shipment by the making up and loading of cargo on drafts, pallets and boxes for export, and the breaking down of such cargo from incoming ships for delivery to the consignees.

[5] References are to the Appendix filed in the Court of Appeals.

> The *existence of a tradition that ILA longshoremen and employees in related crafts did such work is not essentially challenged*" (A15) (Emphasis added).

C. The Harmonization of ILA Jurisdiction With the Container Revolution

In the 1950's, carriers in the Port of New York first instituted the technique of containerization, i.e., the packing of cargo into containers which are then loaded onto the vessel, using containers of ever increasing dimensions. Containerization of cargo, instead of handling cargo on a piece-by-piece basis, is a faster and more efficient method of loading cargo shipped by sea. It also reduces substantially the number of jobs and the quantum of work available for longshoremen. Recognizing the effect of the "containerization revolution" upon its members' work opportunities, the ILA made that issue a major item in the 1959 negotiations. It insisted upon contractual protection of its jurisdiction as to cargo moving in containers. The union maintained that a container was part of the hold of the ship and containerization might take that part of the work away from their members (988a-989a).

The container section of the 1959 collective bargaining agreement ("the 1959 agreement"), compromised the conflicting demands of the parties. Most important, the ILA permitted the use of the innovative technique to continue. The agreement had two essential parts. The first was that shipperload containers (i.e., containers with merchandise from a single shipper loaded by his employees) were permitted to move aboard vessels without rehandling of the cargo by longshoremen, subject only to the payment of a royalty on each container.[6] Second, the smaller shipments of cargo from different shippers were still to be brought to the pier and were to be consolidated there into

[6] The royalty was fixed by an arbitrator's award in November, 1960.

the container by the longshoremen. This was designed to protect the longshoremen's jurisdiction (850a, 1044a-1049a).

During the years that followed, although the ILA continually asserted that some carrier members of NYSA were not honoring the agreement as to consolidated containers, the terms of the 1959 agreement were continued in subsequent contracts without any significant change. Various measures were adopted by the parties to insure compliance by the carriers with the terms of the agreement.

In the late 1960's, the spread of the container revolution to the major shipping trade, the North Atlantic, appeared imminent. This created great concern among longshoremen as to the effect upon their jobs. Accordingly in the 1968 negotiations, the ILA insisted upon the stuffing of all containers, without exception. If acceded to, this would have ended the container revolution. NYSA rejected the demands and the ILA struck. The National Emergency provisions of the Taft-Hartley Act, 29 U.S.C. §§ 171-82, were invoked, including its injunctive provisions. Upon expiration of the 80-day cooling off period, the ILA again went on strike for 57 days. The Presidential Board of Inquiry reported that the impact or consequences of containerization was one of the two critical issues causing the impasse stating:

> "The union is primarily interested at this time in having the same protective measures applicable everywhere with respect to the effects it anticipates from a broadened use of containerization . . . They consider it not unlikely . . . that large portions of the union's membership may be subjected to substantial losses of earnings and jobs (218a)".

The parties eventually agreed to continue the basic provisions of the 1959 agreement. The new labor contract signed in 1969 included a codification of the specific rules dealing with containers that had been formulated and

developed over the ten-year period since 1959 (the "Rules"). It also added provisions for liquidated damages to be imposed upon carriers for violation of the Rules (1017a-1018a, 1053a-1054a, 1093a-1094a).

In 1970, the Rules were tested in the courts. The Second Circuit found they had a valid work preservation objective in the *ICTC* case.[7] Relying upon the declared validity of the Rules, the two subsequent contracts between CONASA and ILA set forth the Rules as one of the seven basic contract subjects agreed upon. However, there were continuing complaints by the ILA that the Rules were not being enforced. Therefore in 1973, it was agreed that, to prevent further violations, carriers would be prohibited from supplying their containers to any consolidator whose facilities were being operated in violation of the Rules ("the Dublin Rules").

D. The Unfair Labor Practice Charges and the Proceedings Below

Consolidated Express, Inc. ("Consolidated") and Twin Express, Inc. ("Twin") are off-pier consolidators organized many years after the 1959 agreement (130a, 134a, 804a-805a). They solicit cargo at their New York off-pier facilities, from various shippers, pack the cargo into the containers supplied by NYSA ocean carriers (728a, 805a) and forward the consolidated container to an ocean carrier in the New York-Puerto Rico trade for shipment on the vessel (403a).

Consolidated and Twin are not parties to the NYSA-ILA contract. They never employed ILA members. The ILA

[7] The Rules set the standards for agreements in other ILA ports from Maine to Hampton Roads, Va. In 1970 these ports aligned themselves into a single overall employer bargaining unit, the Council of North Atlantic Shipping Associations (CONASA). These ports are Providence, Boston, the Port of New York, Philadelphia, Baltimore and Hampton Roads. The negotiations for the 1971 and subsequent contracts were between CONASA and the ILA and the resulting agreements were applicable in the named ports. The Rules were also adopted in ILA contracts with other employers in the South Atlantic and Gulf Coasts.

has neither sought to organize nor to represent their employees (833a).

From the time Consolidated and Twin commenced their consolidation work they "were aware . . . that ILA was claiming jurisdiction over the work they were performing and that NYSA acknowledged that jurisdiction" (A43). Throughout that period it is undisputed that longshoremen stuffed and stripped containers on the docks and "that NYSA companies did have numerous longshoremen on their payrolls designated for stuffing and stripping work" (A36 n.8). NYSA and ILA made vigorous efforts to enforce the Rules. The NYSA ocean carriers involved repeatedly stated that they were adhering to the Rules, were rehandling the cargo in consolidated containers at the piers, and employed longshoremen for the stuffing of containers. At various times from 1966 and for periods ranging up to several weeks, the cargo in the containers of Consolidated and Twin were rehandled at the piers by ILA longshoremen as required by the Rules. Nevertheless, most of the consolidated containers shipped by Twin and Consolidated moved on to the ocean carriers' vessel without rehandling of their cargo by longshoremen until the Dublin Rules were implemented in early 1973.[8]

When carriers refused to supply containers to the charging parties, pursuant to the Dublin Rules, unfair labor practice charges were filed with the 22nd Region of the NLRB. The charges, similar to the charges that had unsuccessfully been filed by the consolidator in the *ICTC* case in the same Region in 1970,[9] asserted that the Rules were

[8] Petitioners asserted that a variety of reasons explained the successful avoidance of the Rules by the charging parties which included the preparation of fraudulent documents (458a) and payoffs to the carriers' supervisory employees (828a-829a).

[9] The plaintiff in *ICTC* had also initiated related proceedings in the 22nd Region claiming, as here, that the Rules violated the Act. The charges were dismissed by the Region since it found that the Rules have "as its object, the preservation of work performed by longshoremen" (269a-270). The dismissal was affirmed on appeal by the NLRB's General Counsel (272a).

violative of the Act. The charges were made the subject of consolidated NLRB complaint proceedings before Administrative Law Judge Arnold Ordman. Judge Ordman dismissed the complaints finding the Rules valid and proper work preservation clauses.[10]

The Board reversed Judge Ordman's decision. The different results reached by the Board and the Majority on the one hand, and Judge Ordman and Judge Feinberg on the other hand, resulted from their differing conclusions as to the nature of the work in controversy.

To the Board, the disputed work was "the LCL and LTL container work performed by [the two consolidators] at their own off-pier premises" (A68). Although the Board conceded that "since the advent of containerization", longshoremen had stuffed containers, it determined that this was only where necessary to perform the loading and unloading of the vessel which was the longshoremen's traditional work. To the Board, somehow this container work was allegedly a different type of container work than that engaged in by the consolidators. Accordingly, in the Board's view, the ILA was seeking to illegally acquire work performed by others. *National Woodwork* was distinguished on the ground that there "the very work claimed had once been performed exclusively" by employees in the unit represented by the union (A70).

The Majority opinion of the Court below, without making any independent analysis, quoted that part of the Board's decision discussing what was the work in contro-

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[10] Other unfair labor practice charges challenging the Rules have been filed in other regions of the NLRB, and are at various stages of resolution, although none have as yet been passed upon by the Board. See, e.g., *Humphrey* v. *ILA*, 401 F. Supp. 1401 (E.D.Va. 1975) (injunction denied—appeal pending); *Danielson* v. *ILA*, 75 Civ. 4027 (S.D.N.Y. 1975) (action stayed); *ILA and Associated Transport*, JD-540-76 (August 19, 1976) (exceptions filed with the Board).

versy (i.e., A68 to A70, quoted at A89 to A91) and affirmed on that ground.[11]

The dissent would have reversed the Board's decision since "it rests upon a basic error of law" (A92-93). The error was in focusing on the work done by the off-pier consolidators rather than the work done in the past by the protected unit.

REASONS FOR GRANTING WRIT

I

The question as to the work in controversy is a substantial and recurring one in the administration of the Act. The decision below, which rests upon a basic error of law and which significantly limits the work preservation doctrine, conflicts with this Court's *National Woodwork* decision sanctioning that doctrine.

The fundamental legal error committed by the majority in its definition of the work in controversy is a pervasive one, extending beyond this case. It is found in every work preservation case. By adopting the Board's erroneous standard, i.e., looking at the work of the outsider and ignoring the traditional work of the unit employees before innovation, the death knell of work preservation has been sounded. The decision is contrary to *National Woodwork*, *ICTC* and all other precedent on which labor and management have relied upon in their negotiations in the area of innovation.

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[11] The Majority stated that as to the NLRB's other reasons such as abandonment "[w]e are not similarly impressed," but "such points are moot in view of the ground we have given for enforcement of the order" (A92).

In view of this statement by the Majority, the Board's error as to abandonment has not been raised in this Petition.

The Board and the majority have turned their backs on *National Woodwork's* teaching that conflicts over automation are to be resolved at the bargaining table. The resulting agreement, as the dissent noted, is entitled to be enforced regardless of its impact on third parties. If the jobs sought to be protected are "the type of unit work which the employees have traditionally performed" then the clause satisfies *National Woodwork* since it is not necessary that the employees "actually perform the work in question", *NLRB* v. *Enterprise Association of Steam, etc. Local Union No. 638,* 521 F.2d 885, 897 n. 25 (D.C. Cir. 1975).[13]

Here the Board has frustrated the *National Woodwork* policy by setting aside the Rules which had resulted from hard bargaining and contending economic pressures over the many years. The decision here ignores the history of negotiation, the demands upon the employer and the "surrounding circumstances of the dispute." Instead it focuses on the effect upon the third party which this Court held was an irrelevant consideration (386 U.S. at 627). The Board thus has rewritten Section 8(e) to comport with its own view of what our national labor policy should be, ignoring the warning in *National Woodwork* that this was for Congress. What this Court declined to do in *National Woodwork,* the Board has done here.

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[13] Certiorari has been granted in the *Enterprise* case, Docket No. 75-777 involving one aspect of the work preservation doctrine as to "the right of control" doctrine. The Court of Appeals for the District of Columbia in refusing to enforce the Board's order had held that the Board's approach as to the "right of control" was "a continuing attempt to circumvent the congressional proviso and is inconsistent with the Court's analysis in *National Woodwork*". [521 F.2d at 901]. The same objection is present here, but the Board's approach here has even a far wider significance. Thus in a recent decision, *Plumbers Local 342,* 225 N.L.R.B. No. 195, 93 LRRM 1146 (September 17, 1976) the Board found a work preservation clause violative of Section 8(e) even though it found the "right of control" doctrine inapplicable, and relied upon its decision in the instant case.

More specifically, if, as a result of this case, the Rules are now held invalid, the entire framework of labor relations in the longshore industry on the East and Gulf coasts, will be radically and significantly altered. The growth of containerized cargo in all ports has given rise to virtually identical work preservation issues, and to the virtually identical collectively bargained resolutions thereof in all ports. The Board's broad order invalidating the maintenance and enforcement of the Rules will thus have equal application throughout the ILA's jurisdiction, from Maine to Texas, where the Rules are presently in effect.

By striking down the Rules, the majority has cast asunder "carefully constructed collective bargaining agreements and rules which were the result of hard bargaining and contending economic pressures" (Dissent, A95). It has created a critical gap in the labor relations in a vital national industry. The bargain struck many years ago has been undone and the parties will once again be forced to grapple with the question of innovation which they thought had been resolved.

The decision stands as a stark warning to any union faced with the demand to permit innovation, that it does so at its peril. Regardless of the agreement of the parties, any outsider may claim a part of the union's jurisdiction if the union was sympathetic to the employer's pleas and permitted innovation. To permit the decision to stand can only result in the elimination of forward-looking collective agreements and a reversion to bloody economic warfare between the two sides at the bargaining table.

In direct conflict with *National Woodwork* the decision below defined the work in controversy as the "LCL and LTL container work performed by (two consolidators) at their off-pier premises", rather than "the work done in the past by the longshoreman" (Dissent, A93). By focusing upon the work done by off-pier consolidators of ocean borne cargo outside of the ILA pier-side bargaining unit,

both the Board and the Majority disregarded the traditional work performed by longshoremen and the elementary principles of *National Woodwork*. As the dissent points out:

> ". . . just as it would have been improper in *National Woodwork* to define the work in controversy as work on the pre-cut doors, it is wrong here to define the work in controversy as off-pier container stuffing." (Dissent, A94).

Under the Board's approach, as adopted by the majority, no work preservation clause could withstand attack.[14] All clauses heretofore upheld as valid, including that in *National Woodwork,* would be illegal. The decision which conflicts with and directly contravenes *National Woodwork* is clearly erroneous and requires reversal by the Court.

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[14] The dissent quoted Judge Ordman as follows:

> "[I]n *National Woodwork* itself, the carpenters employed by the employer refused to install precut doors unless the doors were cut on the jobsite by the carpenters themselves. The carpenters had traditionally performed the work themselves. Yet, obviously the employees of the door manufacturers . . . did that work also. Had the Supreme Court focused on the work being done by the employees of the door manufacturers at the latter's plants, as General Counsel urge be done here with respect to the operations of Consolidated and Twin, then obviously the Supreme Court would have reached a different result in National Woodwork. Indeed, the legitimacy of a work preservation object would be virtually precluded in any situation where it could be established that other employees at other sites were doing or had done the work for which protection was being sought." (A93-A94)

II

The decision below conflicts with decisions in other circuits and in the Second Circuit including one which upheld the very same rules now held illegal and which the parties relied upon in their negotiations.

The instant decision, limiting the longshoreman to loading and unloading vessels, ignores the realities of present day cargo handling and stands virtually alone in having such a restrictive view of the longshoremen's function. Other decisions, both in the Second Circuit, and other circuits, have recognized that much of the longshoreman's work of loading and unloading of the ship now is reflected in the stuffing of containers. To say, as did the Board, that the longshoreman cannot seek to keep the work of stuffing containers, is to deny him the right to preserve his traditional work jurisdiction.

Indeed, in 1970 the Second Circuit in *ICTC* upheld the Rules as valid work preservation provisions. The complaint there had alleged that the Rules were violative of the anti-trust laws. In upholding the Rules, as valid work preservation provisions the Court found that they had as their object "the preservation of work traditionally performed by longshoremen covered by the agreement" (Id. at 887). Since the Board framed the issue here in the same terms (i.e. what was the object of the ILA's activities) the same legal issue present in *ICTC* was present here. Further the operative facts in determining exemption from the anti-trust laws are identical to those for testing the exemption of a labor agreement from Section 8(e) under the *National Woodwork* test (see, 386 U.S. at 620-628). Accordingly, the *ICTC* decision should have been controlling, but, erroneously, it was not.[15]

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[15] Since the precedential significance of *ICTC* was apparent, the majority quoted words from *ICTC* which allegedly showed

(footnote continued on following page)

The original settlement in 1968 had the imprimatur of the Federal government on it. The Presidential Board of Inquiry had recognized that until resolution of the conflict over containerization was resolved, this vital industry would be paralyzed. The parties eventually accommodated their conflicting interest in the resultant Rules. The Rules were then challenged and upheld both in the courts under the anti-trust laws and by the General Counsel's office (*supra*, p. 9). The parties justifiably relied upon those decisions. The subsequent negotiations between the parties were predicated upon the validity of the Rules, which was one of the seven master items applicable up and down the coast. Now, many years later, they are told that a crucial part of their agreement is unenforcible in a decision which has its eyes blinded to both the history of the waterfront, and to the implications for the entire process of collective bargaining.

The rationale of the decision below also conflicts with later decisions by the First Circuit,[16] Second Circuit[17] and Fourth Circuit[18] which dealt with the scope of the 1972 Amendments to the Longshoremen and Harbor Workers Compensation Act, 33 U.S.C. § 901 et seq. (Compensation Act). The Second Circuit in the *Pittston* case, in finding coverage for any longshoreman working on containers at

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(footnote continued from preceding page)

ICTC's inapplicability to the instant case. However, to reach this desired result, the majority had to resort to quoting Judge Hays' opinion out of context and to critically change both the wording and meaning of the language actually appearing in the *ICTC* opinion.

[16] *Stockman* v. *John T. Clark & Son of Boston, Inc.*, Docket No. 75-13 (July 27, 1976) (*Stockman* case) (A147-A174).

[17] *Pittston Stevedoring Corp.* v. *Delaventura, Etc.*, Docket Nos. 76-4042, 76-4009, 76-4043 and 75-4249 (July 1, 1976) (*Pittston* case) (petition for certiorari filed) (A103-A146).

[18] *ITO* v. *Adkins*, Docket Nos. 75-1051, 1076, 1196 and 1088 (Aug. 26, 1976).

terminals, stated that modern cargo handling methods such as containerization had brought about

> "new facts of life on the waterfront, which as this Court noted in [ICTC] mean that a good deal more of the longshoreman's traditional jobs are now performed on shore. Stripping a container of goods destined to different consignees is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of a ship even though it is performed on shore and not in the ship's cargo holds" (A136).

Similarly, the First Circuit in the *Stockman* case found broad coverage in the amendments to the Compensation Act. The Rules challenged here was part of the Boston Shipping Association's agreement with the ILA (see n.7 *supra*). In commenting on the Rules, the court stated that the agreement:

> "reflects a negotiated undertaking to use only longshore labor to strip and stuff containers, and to do so exclusively at waterfront facilities. Doubtless the union insisted upon such a provision because otherwise containers could be driven to most any location and discharged there by non-waterfront labor. And its insistence upon the use of longshore labor was not totally arbitrary. Containerization greatly simplifies and speeds up the actual loading and unloading of the ship itself, cutting down the workforce needed for those operations. *Much of the loading and unloading that used to take place on or alongside the ship is presumably now reflected in the stuffing and stripping of containers. From the longshoremen's point of view this is 'traditional' work, and, as further discussed below, there is much to support their position.*" (A164) (Emphasis added)

These decisions all cited the *ICTC* case with approval. Each noted that the modern cargo handling method had

shifted and transformed the longshoreman's job so that much of the traditional work performed in loading or unloading the vessel now occurs in the form of packing and unpacking containers.

The instant decision, which limits the longsoreman's jurisdiction to loading and unloading of the vessel, thus stands alone and conflicts with the other relevant decisions in this area.[19] The conflict calls for the grant of the writ and reversal of the decision below to restore uniformity in this area.

CONCLUSION

For the reasons set forth it is respectfully urged that the Court grant certiorari.

Respectfully submitted,

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[19] The decision also conflicts with other cases which recognize that a modern day container is "functionally a part of the ship". *Leather's Best, Inc.* v. *S.S. Mormaclynx*, 451 F.2d 800, 815 (2d Cir. 1971).

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INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO
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Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

JOINT APPENDIX TO PETITIONS FOR A WRIT OF CERTIORARI

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Decision of Administrative Law Judge, Arnold Ordman, December 9, 1974.

Statement of the Case

ARNOLD ORDMAN, Administrative Law Judge: The four cases listed in the caption, all consolidated for the purposes of this proceeding, have been submitted, by agreement of the parties, for initial decision by this tribunal on the basis of stipulated records compiled in earlier and related court proceedings conducted in these matters, supplemented by later affidavits furnished by the parties. No testimonial hearing was conducted before me and no oral arguments were presented. However, able and comprehensive briefs and reply briefs have been filed by all parties dealing with the issues raised.

Cases Nos. 22-CC-541 and 22-CC-554 present the issue whether Respondent International Longshoremen's Association, AFL-CIO, herein called ILA, violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended, by threatening and imposing fines upon employer-members of New York Shipping Association, Inc., herein called NYSA, with an object of compelling such employer-members to cease doing business with Consolidated Express, Inc., herein called Consolidated, and with Twin Express, Inc., herein called Twin.

Cases Nos. 22-CE-19 and 22-CC-20 present the issue whether Respondent ILA and Respondent NYSA violated Section 8(e) of the Act by maintaining and giving effect to provisions of their collective-bargaining agreements whereby NYSA and its employer-members agreed to cease doing business with Consolidated and Twin.

ILA and NYSA deny the commission of unfair labor practices.

Critical to the resolution of these issues is the underlying question whether ILA has a valid and legitimate claim, under the doctrine of work preservation, to certain

work being done by Consolidated and Twin in stuffing (packing) and stripping (unpacking) goods in large containers furnished to Consolidated and Twin by employer-members of NYSA and utilized for the shipment of such cargo by sea.

On the basis of the stipulated records and the supplementary affidavits and after careful consideration of briefs and reply briefs submitted by the parties, I make the following:

Findings and Conclusions

I. Jurisdiction

Consolidated and Twin, Puerto Rico corporations, have off-shore facilities within a 50-mile circle around the Port of New York where they are respectively engaged in the business of consolidating, containerizing and forwarding cargoes for shipment by sea and in removing incoming cargoes from containers. In the operation of their businesses, Consolidated and Twin, respectively, annually provide and perform services valued in excess of $50,000 in States and territories of the United States other than the State of New York.

Respondent NYSA has its principal office in New York City and is an incorporated association of employer-members who are engaged in various operations involved in the shipment of general cargo between the Port of New York and foreign countries or other States and territories of the United States. Employer-members of NYSA annually carry general cargo in interstate and foreign commerce valued in excess of $1,000,000.

Consolidated, Twin and NYSA are engaged in commerce within the meaning of Section 2(6) and (7) of the Act. I

find further that ILA is a labor organization within the meaning of Section 2(5) of the Act.

I conclude and find that it is proper to assert jurisdiction in these proceedings.

II. The Unfair labor Practices

A. Background and Clarification of the Issues

For many years the employer-members of NYSA have delegated to NYSA the authority to negotiate and enter into collective-bargaining agreements on their behalf on an association-wide basis with labor organizations which represent employees of the employer-members. Pursuant to such delegation NYSA has entered into agreements with ILA covering employees represented by ILA who work for NYSA members.

NYSA, in turn, has become a member of the Council of North American Shipping Associations, herein called Conasa, which is an association of NYSA and other like shipping associations operating along the Atlantic Coast from Boston, Massachusetts to Hampton Roads, Virginia. On or about 1970 Conasa was given the authority by its shipping association members to negotiate and enter into collective-bargaining agreements in their behalf on a master-contract basis with labor organizations representing employees in the shipping associations comprising Conasa. This authority was limited, however, to several key matters affecting terms and conditions of employment; other such matters continued to be covered in the separate agreements negotiated by the constituent association members of Conasa.

Among the key matters on which Conasa was authorized to, and did, negotiate agreements was containerization, a

subject matter which theretofore had been covered in the agreements negotiated by the constituent association members. That subject matter, as will appear herein, is critical in this proceeding.

For many years longshoremen represented by ILA and operating on the docks, including the docks of the Port of New York, have been handling all solid cargo moving over the docks on a piece-by-piece basis. In recent years, beginning with World War II and at an accelerated pace thereafter, the technique of containerization, i.e., the packing of cargoes into containers and then lifting the loaded containers onto ships specially constructed to carry such containers, has had an increasing impact on earlier work practices. The containers presently in use measure about 40 feet in length and a considerable amount of goods can be consolidated for shipment in such containers.

Containerization of cargo, instead of handling cargo piece-by-piece, is obviously a faster, more convenient and more economical method of loading cargo shipped by sea. By the same token containerization reduces substantially the number of jobs and the quantum of work available for longshoremen. In consequence, and quite foreseeably, differences arose in this regard between employers in the shipping industry, who welcomed the faster and more economical techniques of containerization, and ILA, which resisted the loss of work opportunity containerization caused among the longshoremen ILA represented. These differences were eventually compromised by agreements between NYSA and ILA, supplemented, when Conasa later appeared on the scene, by further agreements between ILA and Conasa.

In sum, ILA, on behalf of the longshoremen on the docks whom ILA represented agreed to yield, as it had from the very outset, any claim to stuff or strip containers where the contents consisted of United States mail, or household

furniture or military effects. Also relinquished was the claim to stuff or strip manufacturers' or shippers' loads, terms of art used to describe the situation where the beneficial owner of the entire contents of a container is a single manufacturer, shipper or consignee. About 80 percent of the containers passing through the Port of New York fell in these surrendered categories.

ILA insisted, however, on retaining the work of stuffing and stripping less-than-container load (LCL) or less-than-trailer load (LTL) cargo. This had reference to situations where goods coming from several shippers and/or destined for several consignees were consolidated into a single container for shipment. ILA insisted, and NYSA agreed, that all containers owned or leased by employer-members of NYSA, used for the shipment of LCL or LTL cargo, and coming from or going to geographical points within a 50-mile circle around the Port would be stuffed and stripped by the longshoremen whom ILA represented and who worked on the docks of the Port for the employer-member of NYSA owning or leasing the containers. If the stuffing of such containers had already been done upon arrival of the container on the docks preparatory to shipment, ILA insisted upon the right of its longshoremen to strip and restuff the contents of the container.

ILA contends that the conduct ascribed to it in the instant cases as constituting unfair labor practices was in actuality conduct directed against NYSA and its employer-members to insure that NYSA complied with its contractual commitments to ILA that the longshoremen on the docks continue to do the agreed upon portion of the work they had historically performed. Such conduct, ILA argues, as does NYSA, is primary lawful activity designed to achieve the legitimate objective of work preservation. The fact that such activity might have, or did have, ad-

verse consequences on neutral entities such as Consolidated or Twin would not, under controlling authority, convert such primary action into secondary action proscribed by Section 8(b)(4)(ii)(B) or Section 8(e) of the Act. *National Woodwork Manufacturers' Association, et al.* v. *N.L.R.B.*, 386 U.S. 612, 627 (1967).

As shown hereunder, Consolidated and Twin did suffer adverse consequences as a result of ILA's action in seeking to insure fulfillment of its contractual arrangements with NYSA and, later, with Conasa. Consolidated and Twin are operations which came into being after the advent of containerization. Consolidated began operations under its present name in 1965; Twin started its operations in 1967. Each is classified as a non-vessel operating common carrier (NVOCC) doing business under tariffs approved by the Federal Maritime Commission. Consolidated and Twin are not members of NYSA and are not affiliated with Conasa. Neither do they have or utilize employees represented by ILA.

The businesses of Consolidated and Twin, so far as here relevant, consist of trade between New York and Puerto Rico. So far as their respective New York operations are concerned, each has off-shore facilities located, as already noted, well within a 50-mile circle around the Port of New York. A primary function of Consolidated and Twin is to act as consolidators. As consolidators, their job is to receive at their off-shore facilities goods which their customers desire to ship and which consist, in the case of each individual shipment, of less than a container-sized or trailer-sized load. Consolidated and Twin, respectively, then consolidate, i.e., unitize, these shipments into containers and forward the loaded containers to steamship companies on the waterfront docks to be placed on ships sailing to the port of delivery. Conversely, containers of LCL

or LTL cargo arriving on incoming ships, after being unloaded from the ships, are transported to the off-shore facilities previously described where the containers are opened and the contents separated for delivery to the ultimate consignees. In a word, therefore, Consolidated and Twin, with respect to containers of LCL or LTL cargo, perform the stuffing and stripping functions which ILA claims.

The containers used by Consolidated and Twin for their operations are furnished to them by the steamship companies which do the actual transporting of the containers by sea. The steamship companies with which Consolidated does business and which are engaged in the New York-Puerto Rico trade are Sea-Land Service, Inc., herein called Sea-Land; Seatrain Lines, Inc., herein called Seatrain; and Transamerican Trailer Transport, Inc., herein called TTT. Twin utilizes the services only of Sea-Land and TTT; it does not utilize the services of Seatrain. Sea-Land, Seatrain and TTT all presently have pier facilities in the Port of New York where each employs longshoremen represented by ILA. Sea-land, Seatrain and TTT are also employer-members of NYSA and, so far as their longshoremen are concerned, are covered by ILA-NYSA and ILA-Conasa agreements.

It is manifest from the foregoing recitation that the interests of ILA on the one hand and Consolidated and Twin on the other, with respect to the handling of LCL and LTL cargo, are in sharp conflict. Consolidated and Twin assert their right to stuff and strip LCL and LTL cargo into containers furnished them by NYSA steamship companies without rehandling by ILA of such cargo when the containers appear on the docks. ILA, for its part, asserts that it has traditionally handled all cargo on the docks and cites also its contractual arrangements with

NYSA and Conasa that longshoremen employed by the employer-members of NYSA perform on the docks all stuffing and stripping work on containers owned or leased by NYSA members which hold LCL or LTL cargo and originate within a 50-mile circle around the Port of New York. As indicated, ILA insists that it is entitled, in situations where such containers have already been stuffed prior to their arrival on the docks for sea shipment, to strip and restuff such containers.[1] To the extent that ILA's position in this regard would be honored, much of the value of the services Consolidated and Twin render their customers would be nullified and the profitability of their enterprises endangered. This, indeed, as more specifically detailed hereunder, was the consequence of the ILA and NYSA conduct under attack here.

General Counsel takes the position, supported by Consolidated and Twin in the respective cases, that the real and primary target of ILA's action and of the challenged agreements between ILA and NYSA was Consolidated and Twin, and that ILA's real objective was to obtain the stuffing and stripping work which these enterprises were performing for the dock employees whom ILA represents. To this end, they argue, ILA was bringing pressure upon employer-members of NYSA as neutral or secondary employers to cease doing business with Consolidated and Twin in order to achieve ILA's objective of getting for its own longshoremen the work Consolidated or Twin were doing. ILA's claim that the longshoremen on the docks of the Port of New York were entitled to that work as a matter of historical tradition and by contract and that it

[1] It should be noted at this point that no problem arises with respect to the work of placing loaded containers aboard ships or removing them from ships. That work is concededly assigned to, and performed by, ILA-represented longshoremen.

was engaged in the lawful and primary activity of work preservation is discounted on the ground that Consolidated and Twin had consistently been performing that work for some years without obstruction from ILA longshoremen and that ILA and its longshoremen had effectively surrendered their right or claim to the work which ILA now claims it is entitled to preserve or recapture.

The disposition of the contested issues presented in the four cases comprising this proceeding turns on an appraisal of the merit of these opposing arguments in the light of the evidence submitted. The relevant evidence will be summarized hereunder following an exposition of the procedural posture of the instant proceeding.

B. The Procedural Posture of the Instant Proceeding

The chronology of this proceeding begins on June 1, 1973. On that date Consolidated filed unfair labor practice charges against ILA in Case No. 22-CC-541 and against ILA and NYSA in Case No. 22-CE-19. Pursuant to these charges General Counsel issued a consolidated complaint, dated August 23, 1973, alleging that ILA had engaged in a secondary boycott in violation of Section 8(b)(4)(ii)(B) of the Act (Case No. 22-CC-541) and that ILA and NYSA together had maintained and given effect to "hot cargo" agreements in violation of Section 8(e) of the Act (Case No. 22-CE-19).

In the interim General Counsel, pursuant to Section 10(1) of the Act also initiated a proceeding before the United States District Court for the District of New Jersey asking for appropriate injunctive relief against ILA and NYSA pending final adjudication by the Board of the issues presented in the consolidated complaint. Extensive

proceedings were conducted before Judge Frederick B. Lacey, covering a period of 7 days between August 20 and August 31, 1973, in which General Counsel, Consolidated ILA and NYSA participated. 1169 pages of testimony were taken and voluminous exhibits were introduced into evidence.

Judge Lacey issued his decision, reported at 364 F. Supp. 205, on September 18, 1973. In that decision, which contains a comprehensive and articulate presentation of the relevant evidence and controlling authorities, Judge Lacey noted the restrained and limited role assigned to the district court in matters of this kind. Under the statutory scheme the determination of the merits of the controversy is for the Board. "The court's sole functions are to determine whether the Board had reasonable cause to believe that the violations charged have been committed and, if so, whether the granting of equitable relief is 'just and proper,'" 364 F. 2d, (*sic*) at 216. Proceeding from this premise and recognizing the existence of disputed factual issues as well as novel applications of established legal principles, Judge Lacey nonetheless concluded that the legal theory advanced by the General Counsel could not be regarded as "insubstantial and frivolous" and that on this criterion there was "reasonable cause to believe" that the charged violations did occur. 364 F. Supp., at 217. Judge Lacey further concluded that under all the circumstances equitable relief was just and proper, and granted the temporary injunctions sought against ILA and NYSA.

The Court of Appeals for the Third Circuit, on December 20, 1973, affirmed Judge Lacey's decision without published decision. 491 F. 2d 748.

Late in October 1973, following the issuance of Judge Lacey's decision, all parties to the consolidated complaint in Cases Nos. 22-CC-541 and 22-CE-19, pending before the

Board, agreed to submit the cases on a stipulated record to a duly-designated Administrative Law Judge of the National Labor Relations Board for initial decision and recommended order, reserving the right to file briefs before the Administrative Law Judge. The stipulated record consisted of the charges and pleadings in the consolidated cases together with the transcript of testimony and all exhibits received in evidence in the district court proceeding before Judge Lacey.

On November 7, 1973, the undersigned, having been duly designated as Administrative Law Judge, issued a telegraphic directive to the parties to file memoranda addressed to the questions whether critical question of credibility were posed in the stipulated record and, if so, whether such questions could be resolved without hearing and observing the witnesses. Memoranda filed in response to this directive were in accord that a hearing to resolve such evidentiary conflicts as existed would serve no useful purpose. Accordingly, on November 30, 1973, the undersigned issued a further directive dispensing with any further evidentiary hearing and directing the parties to file briefs as to the merits of the cases.

Crossing in the mails with this November 30 directive was a motion, also dated November 30, 1973, by Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Local 807, to intervene in the proceeding initiated by Consolidated's unfair labor practice charges. The grounds for intervention urged by Local 807 were that it presently represents the employees of Consolidated assigned to the work in dispute; that prior to August 1973 it represented the employees of U.S. Trucking Company which had been doing the disputed work for Consolidated under contract with the latter; and that the interests of the employees

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Local 807 represented would be directly affected by the outcome of the instant cases.[2]

While this motion was pending and awaiting ruling, Cases No. 22-CC-554 and 22-CE-20, the third and fourth cases named in the caption, became ripe for Board consideration. Except for the fact that Twin, instead of Consolidated, was the Charging Party, the latter two cases are a virtual replay of the earlier two cases. Twin filed its unfair labor practice charges against ILA and against ILA and NYSA in the respective cases on November 2, 1973. As had been the situation with the charges filed by Consolidated, General Counsel, here too, issued a consolidated complaint alleging, on the basis of an almost identical fact pattern, that ILA had violated Section 8(b)(4)(ii)(B) of the Act (Case No. 22-CC-554) and that ILA and NYSA together had violated Section 8(e) of the Act (Case No. 22-CE-20). The complaint in these two cases was dated January 3, 1974, and on January 11, 1974 General Counsel moved to consolidate all four cases for decision, predicating that motion on the circumstances that the named Respondents were the same and that the critical facts and legal issues were for the most part common, to the extent not identical, in all four cases.

Respondents ILA and NYSA opposed both the motion of Local 807 to intervene in Cases Nos. 22-CC-541 and 22-CE-19, and the motion of General Counsel to consolidate all four cases for decision. However, on January 23, 1974, the undersigned granted both motions, essentially for the reasons stated in the motions.

In the meantime, General Counsel had, as in the earlier cases involving Consolidated, initiated proceedings in the

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[2] Local 807 explains its somewhat tardy motion for intervention on its assertion that it learned of the instant proceeding only after publication of Judge Lacey's decision in the injunctive proceedings.

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United States District Court for the District of New Jersey in which it sought similar temporary injunctive relief in the cases involving Twin. District Court proceedings in this matter were conducted, again before Judge Lacey, on January 29, February 5 and February 6, 1974, with General Counsel, ILA, NYSA and Twin participating. Again, extensive testimony was taken and numerous exhibits were introduced into evidence. Judge Lacey issued his decision in this matter on April 19, 1974. *Balicer, etc.* v. *International Longshoremen's Association and New York Shipping Association,* Docket No. 1155-73, reported at 86 LRRM 2559. After summarizing the relevant evidence Judge Lacey, applying essentially the same criteria and authorities he had previously applied, concluded that for purposes of the proceeding before him, there was reasonable cause to believe that the charged violations had been committed and that the grant of equitable relief in the form of a temporary injunction was just and proper. *Ibid.*

Contemporaneously with the proceeding before Judge Lacey in the two cases involving Twin, efforts were made at the agency level to accelerate the administrative proceedings in the now-consolidated four cases. The undersigned conducted a pretrial hearing in Newark, New Jersey on March 20, 1974, with all parties represented, devoted solely to the purpose of clarifying and/or narrowing the issues and/or exploring procedures to expedite resolution of those issues. Renewed requests by ILA and NYSA at this hearing to deny intervention to Local 807 in Cases Nos. 22-CC-541 and 22-CC-19 and to withdraw the order consolidating all four cases were rejected. The pretrial hearing, however, failed to resolve the disagreement among the parties as to whether, in view of the intervention and consolidation, an evidentiary hearing would be required at the administrative level.

That disagreement was resolved shortly thereafter. In April 1974 all parties entered into a Stipulation, approved by the undersigned, that all four cases named in the caption be submitted to the undersigned "for decision and recommendations to the Board as to findings of fact, conclusions of law and order . . . ." It was further agreed that the record upon which the "decision and recommendations" would be based would consist solely of the relevant pleadings, the Stipulation, and the entire records in both injunction proceedings before Judge Lacey. In addition, provision was made for Local 807, as intervenor in the cases involving Consolidated, to submit affidavits as its presentation of evidence and for Respondents to submit reply affidavits. Right was reserved by all parties to file appropriate motions or objections in this regard. Provision was also made for all parties to submit briefs and, subsequently, reply briefs to the undersigned. The earlier stipulation entered into in late October 1973 with reference to the cases involving Consolidated only was superseded.

During the course of the next few months ending in July 1974 the affidavits and counter-affidavits permitted by the Stipulation were filed. Submitted also, as previously noted, were briefs and reply briefs by the several parties. As agreed by the parties, no evidentiary hearing was conducted before the undersigned.

This summarizes the procedural posture of the instant proceeding and the basis upon which the instant decision is predicated.

C. The Relevant Evidence; Subsidiary Findings

The changing technology brought about by containerization has had a marked impact on employment conditions and employment opportunities both on and off the water-

front. The situation in this regard in New York and in the Port of New York is not atypical.[3]

As previously noted, virtually all solid cargo moving over the docks in the Port of New York had for decades been handled on a piece-by-piece basis by longshoremen and employees in related crafts who worked on the docks and were represented by ILA. Typically, that work included the preparation of cargo for shipment by the making up and loading of cargo on drafts, pallets and boxes for export, and the breaking down of such cargo from incoming ships for delivery to the consignees. The existence of a tradition that ILA longshoremen and employees in related crafts did such work is not essentially challenged.

After World War II the use of wooden boxes of about 8 cubic foot content for the shipment of certain loose cargo came into vogue. This technique had no appreciable impact on the longshore industry, however, and longshoremen continued generally their handling of all cargo moving over the docks.

As the years went on, these wooden boxes were supplanted by metal containers of larger and larger size and in due course ships known as containerships specifically designed to carry these large containers or trailers came into common use. Standard cargo ships were also adapted to carry containers. The containers presently utilized measure in the 35 to 40 foot category and are a major component in the transportation of cargo by sea. The record evidence is undisputed that containerization of cargo is an efficient, fast and, from the point of view of the shipping

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[3] See generally, Ross: *Waterfront Response to Technological Change: A Tale of Two Unions,* Labor Law Journal, July 1970, pp. 397-419. The impact of containerization in the Pacific Coast ports of the United States is described in *ILWU, et al. and Pacific Maritime Association,* 208 NLRB No. 130, 85 LRRM 1300 (Feb. 1974).

industry, an economical technique for handling the shipment of goods. By the same token, it is also established and undisputed that containerization reduced substantially the need for longshore and other labor required before the advent of containers.

1. Disputes between NYSA and ILA over the use and handling of containers; contractual arrangements between ILA and NYSA

As soon as containerization became a significant factor in the shipping industry, NYSA and ILA became embroiled in controversies on that subject matter which controversies, as shown, *inter alia,* by the instant proceeding, have not yet abated. Generally speaking, NYSA has pressed for the free use of containers without restriction or limitation by ILA. ILA, for its part, has sought and is still seeking, in behalf of the longshoremen it represents, to cushion the adverse effect of containerization upon the quantum of work the longshoremen have traditionally performed in the handling of cargo passing over the docks.

Thus, in 1958 ILA perceived the potential threat to longshore work implicit in containerization which was beginning to make inroads on the handling of cargo for sea shipment. Although the containers then in use were mostly of Dravo size (8 cubic feet), ILA protested that, *pro tanto,* the amount of work performed by longshoremen on the old piece-by-piece loading system was being cut back. Grievances were filed and strike action was taken by ILA against NYSA and, as a result a compromise was reached in a 1959 agreement between ILA and NYSA. Section 8 of the 1959 Memorandum of Settlement entitled "Containers-Dravo Size or Larger" provided:

> a. Any employer shall have the right to use any and all type of containers without restriction or stripping by the union.

> b. The parties shall negotiate for two weeks after the ratification of this agreement, and if no agreement is reached shall submit to arbitration . . . the question of what should be paid on containers which are loaded or unloaded away from the pier by non-ILA labor, such submission to be within 30 days thereafter.
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> c. Any work performed in connection with the loading and discharging of containers for employer members of NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates.

There is substantial conflict in the record as to the correct legal interpretation of the foregoing language. Witnesses proffered by Respondents before the District Court testified that the intent of the parties to the agreement was to insure that consolidation of LTL cargo or LCL cargo be performed by longshoremen on the waterfront. General Counsel, on the other hand, adduced evidence to establish that the import of the language of the agreement was that there would be no restriction on the handling of LTL or LCL containers except that royalty payments would be paid on such containers not originally handled by ILA, and that NYSA members and their subcontractors would utilize longshoremen on the docks to consolidate their own LTL or LCL cargo. Without laboring the point or detailing the considerable testimony and other evidence elicited in this regard, it is plain that the several clauses above-quoted are analytically vulnerable to different interpretations.

The critical question on this facet of the case, however, is whether these clauses reflect a traditional practice on the part of ILA longshoremen, at or about the time of

the 1959 agreement, of doing the consolidation work on LTL or LCL cargo. Judge Lacey, who heard the witnesses, addressed himself to this precise issue in his opinion in the Consolidated injunction case and concluded (364 F. Supp. at fn. 5) that this was a disputed fact which the Board would have to resolve. Not having heard the witnesses, and on the basis of a cold record, I find myself unable to resolve the conflicts in the evidence bearing on this question. However, with all due deference to Judge Lacey, I think it unnecssary to resolve the conflict. Whatever the precise scope of the quoted clauses, it is clear that ILA was in 1958 and 1959 concerned about the inroads made into its workload by the then incipient and modest containerization effort and was taking steps to abate that threat. More to the point, the 1959 Agreement establishes, at the least, that ILA was not abandoning its claim to work which it had formerly done and which now was being handled in part by containerization.

The less than precise language of the 1959 Agreement gave rise, as might have been anticipated, to substantial and recurrent disputes during the ensuing years as to who was to do particular consolidation work. Work stoppages took place. In 1967 the first fully containerized ship designed to carry large containers was introduced into the North Atlantic trade and there was mounting concern among the longshoremen as to the impact on their jobs. Accordingly, ILA formulated its demand that longshoremen stuff and strip all containers without exception. NYSA countered with a demand that all existing restrictions on the movement of containers be eliminated. Bargaining negotiations, generally, foundered. A 57-day strike ensued and a Presidential Board of Inquiry was appointed. Ultimately the differences between the parties were resolved and ILA and NYSA entered into their 1968 col-

lective-bargaining agreement. The 1968 agreement was actually executed in February 1969.

With respect to the problems of containerization, the 1968 agreement spelled out for the first time detailed provisions covering this subject matter. These provisions were denominated as Rules on Containers and with later changes, which will be noted, continued to appear in subsequent collective bargaining agreements. Following an opening statement which recites the intention of the parties "to protect and preserve the work jurisdiction of longshoremen and all other ILA crafts at deepsea piers and terminals," the Rules on Containers provided, so far as relevant here:

Rule 1. Definitions and rule as to containers covered.

Stuffing—Means the act of placing cargo into a container.

Stripping—Means the act of removing cargo from a container.

Loading—Means the act of placing containers aboard a vessel.

Discharging—Means the act of removing containers from a vessel.

These provisions relate solely to containers meeting each and all of the following criteria:

(a) Containers owned or leased by employer-members (including containers on wheels) which contain LTL loads or consolidated full container loads.

(b) Such containers which come from or go to any person (including but not limited to a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including

a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo.

(c) Such containers which come from or go to any point within a geographical area of any port in the North Atlantic District described by a 50-mile circle with its radius extending out from the center of each port.

Rule 2. Rule of stripping and stuffing applies to such containers.

A container which comes within each and all of the criteria set forth in Rule 1 above shall be stuffed and stripped by ILA longshore labor. Such ILA labor shall be paid and employed at longshore rates under the terms and conditions of the General Cargo Agreement. Such stuffing and stripping shall be performed on a waterfront facility, pier or dock. No container shall be stuffed or stripped by ILA longshore labor more than once. Notwithstanding the above provisions, LTL loads or consolidated container loads of mail, of household goods with no other type of cargo in the container, and of personnel (*sic*) effects of military personnel (*sic*) shall be exempt from the rule of stripping and stuffing.

Rule 3. Rules on No Avoidance or Evasion.

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(e) Failure to stuff or strip a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 2 shall also be considered a violation

of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been stuffed or stripped under the rules, then the steamship carrier shall pay, to the joint Container Royalty Fund liquidated damages of $250 per container which should have been stuffed or stripped. Such damages shall be used for the same purposes as the first Container Royalty is used in each port. If any carrier does not pay liquidated damages within 30 days after exhausting its right to appeal the imposition of liquidated damages to the Committee provided in (g) below, the ILA shall have the right to stop working such carrier's containers until such damages are paid.

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The import of the foregoing language was quite plain. With certain exceptions previously described herein, ILA represented longshoremen working on the docks were to stuff and strip LCL and LTL cargo in containers owned or leased by NYSA members and originating within a 50-mile circle around the port. Breach of these provisions called for liquidated damages to be imposed upon the offending carrier in the amount of $250.

Nonetheless, disputes concerning the proper application of the Rules on Containers continued and $250 penalties under the Rules were imposed. In 1970, by agreement between ILA and NYSA, liquidated damages for violations of the Rules on Containers were increased from $250 to $1000. This change proved ineffective also. ILA continued to complain to NYSA that the Rules were being violated and additional damages were imposed, predicated now on a $1000 basis. A major source of ILA's complaints during this period was that consolidators and truckers were doing

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work which was clearly within the jurisdiction of the ILA under the contract.

The disputes culminated in a meeting held in Dublin, Ireland, between representatives of ILA and representatives of Conasa on behalf of its employer-association members, including NYSA. The purpose of the meeting was to obtain enforcement of the Rules on Containers. On January 29, 1973, ILA and Conasa entered into a supplemental agreement, herein referred to as the Dublin Supplement. The Supplement provided so far as pertinent here:

> Enforcement of Rules on Containers.
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> • • • • •
>
> 1. (a) All outbound (export) consolidated or LTL container loads (Rule 1 containers) shall be stripped from the container at pier by deepsea ILA labor and cargo shall be stuffed into a different container for loading aboard ship.
>
> 1. (b) All inbound (import) consolidated or LTL cargo (Rule 1 containers) for distribution shall be stripped from the container and the cargo placed on the pier where it will be delivered and picked up by each consignee.
>
> 2. No carrier or direct employer shall supply its containers to any facilities operated in violation of the Rules on Containers including but not limited to a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder who is either a consolidator or a distributor. No carrier or direct employer shall operate a facility in violation of the Rules on Containers which specifically require that all containers be stuffed or stripped at a waterfront facility (pier or dock) where vessels normally dock.
>
> A list shall be maintained of consolidation and distribution stations which are operated in violation of the Rules for the information of all carriers and direct employers. Any container consolidated at or distributed from such facilities shall be deemed a violation and subject to the rules on stuffing and stripping.
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The evidence in the record amply supports a finding, and I so find, that following the execution of the Dublin Supplement on January 29, 1973, ILA has threatened to assess, and has assessed, liquidated damages against employer-members of NYSA, including Sea-Land, Seatrain and TTT for violations of the Rules on Containers. The assessments imposed by ILA, calculated at the rate of $1000 per container, add up to substantial figures. The result of the assessments and the threat of further assessments is that Sea-Land and TTT ceased furnishing Consolidated and Twin with containers necessary for the operation of their businesses and Seatrain engaged in like conduct with respect to Consolidated. The alternative for the three shipping companies was to continue furnishing the consolidators with their containers which on arrival at the piers would have to be stripped and restuffed at the expense of the shipping companies. As a result Sea-Land and Seatrain completely ceased doing business with Consolidated before the end of March 1973 and Sea-Land ceased furnishing containers to Twin. TTT continued to do business with Consolidated and Twin but only by furnishing them with "foreign" trailers (which did not carry TTT's name) and even these trailers were stripped and restuffed by ILA labor at the piers.

In addition, pursuant to the last paragraph of Section 2 of the Dublin Supplement, the NYSA-ILA Contract Board, the administering body under the collective-bargaining agreement, issued a notice to all NYSA members, dated April 13, 1973, announcing that NYSA carriers had been assessed liquidated damages for violations of the Rules on Containers in that containers had been stuffed and stripped at the premises of 14 employers named therein. Consolidated and Twin were among the 14 employers named.

2. The operations and history of Consolidated

As already indicated, Consolidated began its operations in 1965. At that time it took over certain of the operations of a preexisting company, Valencia-Baxt, which had been engaged for many years prior thereto in furnishing the kind of services which Consolidated rendered. Judge Lacey concluded that on the basis of the evidence presented before him, "the Board could find, within the 'reasonable cause' formulation of § 10(1), [Consolidated] to be a de facto and de jure successor to Valencia-Baxt insofar as its marine cargo business is concerned" (fn. 2 of the Judge Lacey opinion in the *Consolidated* case (364 F. Supp. 205)). Applying the criteria for a finding under Section 10(e) of the Act rather than the criteria of Section 10(1), I doubt the sufficiency of the evidence to warrant a finding of successorship. On the other hand, I do find that insofar as Consolidated handled and containerized cargo for sea shipment from New York to Puerto Rico, it was performing functions which had previously been performed by Valencia-Baxt at the time of the takeover by Consolidated and in substantially the same manner.

Consolidated, like Valencia-Baxt, operated as a consolidator, containerizing LCL or LTL cargo for shipment to Puerto Rico from its facility which at the time relevant here was located in Maspeth, New York within a 50-mile circle around the Port of New York. During all the times here pertinent and, indeed, until as late as August 1973 Consolidated had no trucking employees of its own but, like Valencia-Baxt, contracted with U.S. Trucking Company to do all the packing, loading and delivery work in, and to and from, its Maspeth facility and the Port of New York. The employees of U.S. Trucking Company are represented by Teamsters Local 807. In August of 1973, after the critical events here in controversy, Consolidated terminated its arrangement with U.S. Trucking Company and now does the work with its own employees who are presently represented by the same Local 807.

Consolidated, as also already noted herein, is not a member of the NYSA. As is manifest from the foregoing recitation, the work which Consolidated was doing, i.e., consolidating LCL or LTL cargo in containers leased to it by NYSA members fell precisely within the boundaries of the work described in the 1968 ILA-NYSA agreement and in later agreements. ILA, pursuant to its work preservation contention, claims this work under its contractual arrangements and also under its tradition of always having handled such work long before specific contractual arrangements therefor.

General Counsel, and Consolidated in its own behalf, contend that whatever the validity of ILA's claim under contract or under tradition, Consolidated has in fact from its very beginnings consolidated LCL and LTL cargo at its own premises and transported it in containers to the Port of New York for shipment to Puerto Rico without any interference of any consequence from ILA in the way

stripping or restuffing by ILA deepsea labor. In a word, Consolidated argues that it has its own tradition, virtually unbroken over a period of years, of doing its own containerization of LCL and LTL cargo.

Considerable evidence was adduced by Respondents ILA and NYSA in an endeavor to show that ILA-represented deepsea labor, longshoremen and related crafts, did over the years regularly strip and restuff Consolidated's LCL and LTL containers when they arrived at the docks. ILA also argues that to the extent this was not done, the omission was because deceptive action was taken to conceal from ILA that containers not stripped and restuffed by ILA did not fall in the category of work to which ILA was entitled or to indicate that the stripping and restuffing by ILA deepsea labor had already been performed.

On the other hand, persuasive and cogent evidence was adduced by General Counsel to show that with a few acknowledged exceptions Consolidated's containerized shipments over the years went through the Port of New York and were loaded for shipment without interference by ILA in the way of stripping or restuffing. Moreover, ILA's argument that this was attributable in large part to deceptive practices designed to keep ILA unaware of what was really going on is not, on all the evidence of record, very persuasive.

A recitation here of the conflicting evidence is not required. Judge Lacey, in his opinion in the Consolidated injunction proceedings (364 F. Supp. 205) ably reviews that evidence in detail and makes recapitulation unnecessary here. Upon my own independent review of that evidence, supplemented by other evidence furnished in the consolidated proceedings pending before me, I conclude and find that the preponderance of the evidence, testimonial and documentary, establishes that, with a few exceptions noted hereunder, Consolidated containers passed over

the docks without rehandling by longshoremen on the docks.[4]

The exceptions to Consolidated's handling of its own containerization work without interference by ILA are not in dispute. Roy M. Jacobs, co-owner, executive vice-president, and chief operating officer for Consolidated in the United States, admitted that Consolidated's containers were subjected to stuffing and stripping in 1966 or 1967, about a year after Consolidated began its operations. This stuffing and stripping took place at both Sea-Land and Seatrain, the only two carriers engaged in the Puerto Rican trade at that time, and continued for a period of about 3 weeks.[5]

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[4] In this connection it is noteworthy that in the briefs submitted to me, NYSA and ILA are considerably less vigorous than they were at the hearings before Judge Lacey in the claims that ILA longshoremen regularly stripped and restuffed Consolidated containers. On pp. 5-7 of its main brief, NYSA argues merely that the documentary evidence of the various carriers indicated that containers of both Consolidated and Twin were being stuffed and stripped by ILA deepsea labor. NYSA then argues that whether the containers were actually being stuffed and stripped was not "the crucial factor." In NYSA's view the documents do establish the knowledge of the parties that ILA deepsea labor should have stuffed and stripped the containers in question. As NYSA states (Br. 6), "The existence of these documents, not their accuracy, is the crucial factor." ILA in its main brief (pp. 9-10, 45, 56) explains the substantial "slippage" of containers through the Port on the basis of "longstanding deceptions, payoffs and misrepresentations" designed to keep ILA ignorant of the fact that its work was being siphoned away. In its reply brief (p. 5) ILA states that it "does not have the effrontery to claim to have handled or rehandled the work of third parties (i.e., cargo consolidated by the Charging Parties)." Again, ILA alludes to "underhanded practices."

[5] Significantly, this stuffing and stripping took place about 2 years before the Rules on Containers were first codified in the 1968 NYSA-ILA agreement. As NYSA and ILA argue, this tends to confirm their contention that ILA had even before the 1968 agreement claimed and exercised the right to strip and restuff containers loaded with LCL or LTL cargo when such containers were brought to the docks.

Jacobs also admitted that at the end of 1968 he was advised by various people in the steamship companies that containers holding LTL or consolidated cargo would have to be stuffed and stripped at the piers. According to Jacobs, however, he was also told at the same time that this should be of no concern to him or to others in his type of business. Nevertheless in 1971, 2 years before the Dublin Supplement was executed, Consolidated's containers were again stuffed and stripped at the piers. According to Jacobs, he was told that though written contract rules required this procedure there was an understanding that the procedure would not apply to his enterprise and that the "heat" would soon be off, "not to worry about it."

Apart from these exceptions, it is apparent, however, that, generally speaking, throughout the period under consideration here, the containers loaded by Consolidated went through the Port of New York without interference. But it is equally apparent that Jacobs was aware from 1966 or 1967 that ILA claimed, and occasionally exercised, the right to strip and stuff Consolidated containers. More importantly, Jacobs was admittedly later made aware that under contract rules containers holding LCL and LTL cargo had to be stripped and stuffed at the piers. He relied, however, on assurances that there was an understanding or "quasi-contract" that these rules would not be applied to Consolidated. As noted, in practice these rules were not so applied.

The situation in this regard changed dramatically in 1973 following the execution of the Dublin Supplement. Jacobs was informed by representatives of the three carriers with which Consolidated did business of the Dublin meeting and the rules there adopted to put teeth into the stripping and stuffing provisions of the earlier NYSA-ILA

agreements. Beginning in early February Sea-Land, followed thereafter by Seatrain and TTT, began stripping Consolidated's containers. This time the situation did not "blow over." In March 1973, pursuant to paragraph 2 of the Dublin Supplement Sea-Land stopped supplying containers to Consolidated. Later that same month Seatrain took the same action. TTT adopted a different tactic; it ceased furnishing Consolidated containers marked with the TTT name but instead supplied "foreign" trailers acquired from railroad pools. ILA, nonetheless, continued to stuff and strip these "foreign" trailers.

The adverse impact of this situation upon the business of Consolidated is amply established by the evidence contained in the record and I find, as did Judge Lacey, that it was substantial.

3. The operations and history of Twin

The situation respecting Twin is quite parallel to that respecting Consolidated and is set forth in the decision of Judge Lacey in the injunctive proceedings in the *Twin* case, reported at 86 LRRM 2559. Again, recapitulation will be avoided and only the relevant differences will be noted.

Twin was organized and did business in substantially the same manner as Consolidated. Twin, however, did not begin its operations until 1967 and, unlike Consolidated, did not take over the work of a former enterprise. During the period from March 1967, when Twin began its operations, until 1969 when Twin moved to its current Manhattan address, Twin used the services of independent trucking companies to perform its stuffing and stripping operations and its delivery of containers to and from the piers. The employees of these trucking companies were not organized

or represented. Since its move to Manhattan, Twin has hired employees of its own to perform stuffing, stripping and delivery operations, supplementing their efforts, as needed, with the services of independent trucking companies. Since September 1970 Twin's employees have been represented by Teamsters Local 707.

Since Twin began its operations in 1967 and until 1973 Twin, generally, either through the use of independent trucking companies or through the use of its own employees, performed its own stuffing and stripping operations without ILA interference. As with Consolidated, there were exceptions to their general practice. For two brief periods in 1968 and 1971 Twin's containers were stripped and restuffed at the piers by ILA personnel.

Like Consolidated also, Twin was aware as early as 1968 that its right to stuff and strip containers without interference by ILA was under challenge. As noted, its containers were subjected to ILA stuffing and stripping in 1968. Inasmuch as the 1968 NYSA-ILA agreement of 1968 containing a codification of the Rules on Containers was not executed until February of 1969, Twin was aware even prior to that agreement that ILA claimed the work in question.

Following the execution of the Dublin settlement, Twin was subjected to the same pressures and tactics as Consolidated. ILA threatened to assess, and did assess, penalties in the form of liquidated damages upon the member companies of NYSA who did business with Twin in violation of ILA's agreements with NYSA and Conasa. Twin was also listed in the notice issued by the NYSA-ILA Contract Board,[6] dated April 13, 1973, to all NYSA members which announced that carriers had been assessed liquidated

[6] The Contract Board was also entrusted with the responsibility of administering the Rules on Containers.

damages for violations of the Rules on Containers stuffed or stripped at the premises of 14 named employers. Twin, like Consolidated, was one of the named employers. The result of these pressures was that Twin's business relationships with the carriers it utilized was brought to a virtual halt and its continued operation endangered.

D. Analysis and Conclusionary Findings

1. The disputed issue

The ultimate questions to be decided here are (1) whether, as alleged in the consolidated complaints, ILA engaged in a secondary boycott in violation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended; and (2) whether, as also alleged, ILA and NYSA together entered into and maintained in effect a hot cargo agreement proscribed by Section 8(e) of that Act.

The area of controversy among the parties as set forth in Section II A of this Decision is really quite narrow. Essentially, it is whether ILA's activities and the agreements between ILA on the one hand and NYSA and Conasa, as representative for NYSA, on the other, all relating to the objective of having ILA-represented longshoremen on the docks stuff and strip NYSA owned or leased containers of LCL and LTL cargo, were primary in nature and protected under the Act, or whether that activity and the cited agreements had secondary objectives and, hence, were illicit and proscribed by the Act.

If the latter, then it is plain—no one argues to the contrary—that the requirements necessary to establish a violation of Section 8(b)(4)(ii)(B) and 8(e) of the Act are satisfied.

The primary-secondary determination, in turn, hinges on whether ILA was engaged in legitimate work preserva-

tion efforts or whether work preservation was merely a facade behind which ILA was promoting efforts to obtain work of Consolidated and Twin to which it was not rightfully entitled.

If it is established that the real target of ILA's activity was NYSA and the preservation of work to which ILA represented employees working in the Port of New York were entitled as a matter of historical tradition and contractual arrangement, then it is clear that, under well settled principles, both the activity and the contractual arrangements are primary and immune from statutory sanctions under the Act. Nor would the fact that Consolidated and Twin suffered severe economic consequences convert that primary activity into activity with a secondary objective.

If, on the other hand, ILA had no paramount claim to the work it sought, then the real targets of its actions, on the evidence here disclosed, were Consolidated and Twin. ILA's pressures upon NYSA members would then be plainly secondary and proscribed by Section 8(b)(4)(ii)(B). By the same token, the contractual arrangements here challenged would be secondary in nature and violative of Section 8(e) of the Act.

None of the parties takes fundamental issue with this analysis. The controlling principles are, of course, laid down in *National Woodwork Manufacturer's Association, et al.* v. *N.L.R.B.,* 386 U.S. 612, decided by the Supreme Court in 1967, the lead case in this area. Recapitulation of the analysis and holdings in that decision would be superfluous here.

It is wholly appropriate, therefore, to turn directly to the critical issue, hotly disputed by the parties, namely, whether ILA's activities and its contractual arrangements were genuinely directed to the legitimate objective of work

preservation, as ILA and NYSA urge, or whether as General Counsel and the Charging Parties earnestly contend, the real target of ILA's activities and its contractual arrangements with NYSA was to obtain work which belonged to Consolidated and Twin and for which ILA had no legitimate or supervening claim.

The question is, essentially, one of fact. The guiding principle for that factual determination, as all parties acknowledge, was also laid down in *National Woodwork.* Here, as in that case, the determination whether the contested contractual clauses and their enforcement violated Section 8(e) and Section 8(b)(4)(ii)(B) of the Act

> cannot be made without an inquiry into whether, under all the surrounding circumstances,[28] [ILA's] objective was preservation of work [for the employees of NYSA whom ILA represented] or whether the agreement and boycott were tactically calculated to satisfy union objectives elsewhere.

386 U.S., at 644. "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees." *Id.,* at 645.

With shrewd prescience the Court noted, "This will not always be a simple test to apply." A plethora of cases, decided by the Board and the federal appellate courts since *National Woodwork,* confirms the accuracy of the Court's prediction. The parties in this proceeding each

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[28] As a general proposition, such circumstances might include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry.

find ready precedents to support their respective positions and, in turn, each finds the other's precedents quite distinguishable. My own review of the many precedents cited satisfies me that the differing results in those cases turn fundamentally on the appraisal by the deciding tribunal of the particular facts of each case. This, of course, is a necessary and foreseeable result of the test laid down in *National Woodwork.*

This case, too, must be decided on its own facts.

2. The work in controversy

At the outset, it is essential to define with some precision the work in controversy since that is the predicate upon which the issue of work preservation must turn.

Historically, to be sure, longshoremen as a practical matter handled virtually all solid cargo moving over the docks on a piece-by-piece basis. Viewed in isolation, this would, to be sure, establish an historical tradition upon which ILA could predicate a continuing claim of entitlement to the continued handling and "unitizing" of such cargo. However, the advent of containerization, beginning about World War II and growing at a significant rate during the past few decades, cannot be overlooked. As already set forth, containerization became a hotly disputed issue between ILA and NYSA from the very outset. Understandably, NYSA fought for unrestricted use of containers without limitation and ILA resisted the obvious encroachment which containerization threatened upon the quantum of work available for the dock workers it represented.

Over the years compromises have been made between NYSA and ILA, the contracting parties, on this subject

matter.[7] Thus, ILA has expressly and under contract surrendered its jurisdiction to stuff and strip containers containing shippers' loads, previously described herein, or containers originating outside a 50-mile circle around the Port of New York, or containers containing military or household effects. Concededly, ILA has thus surrendered its claim to stuff and strip about 80 percent of the containers passing over the docks. ILA insists, however, that it has never surrendered its jurisdiction to stuff and strip containers containing LCL or LTL cargo and its present agreements with NYSA and Conasa expressly assert that jurisdiction. Even in this limited area, however, ILA's claim is further circumscribed. Its jurisdiction is asserted only with respect to those LCL or LTL containers "owned or leased" by members of NYSA with which ILA has a bargaining and contractual relationship.

In this sense, therefore, the area of work in dispute is quite narrow.

3. The "conflicting" traditions

Respondents, preliminarily, take the broad position that, historically and long before the advent of containerization, longshoremen and related crafts working on the docks of the Port of New York and represented for many years by ILA, "unitized" cargo which passed over the docks. Inasmuch as containers are merely another form for "unitizing" cargo, the claim is that ILA has an unbroken tradition in that regard. More particularly, however, as ILA asserts in its main brief (p. 23), [t]he crux of ILA's

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[7] It can fairly be anticipated that improved technology combined with other economic and sociological factors will bring about further compromises in this area. That, however, is not a problem presented here.

position has been and remains that since (ILA) longshoremen have always stuffed and stripped containers, ILA retains the right to assert its jurisdiction to preserve such work for the longshoremen at the pier or dock.'"[8] While quarreling with the conclusion in the quoted statement, neither General Counsel nor the Charging Parties challenge the proposition that ILA did containerization work on the piers.[9]

Both General Counsel and the Charging Parties formulate the issue differently. In their view the argument of tradition advanced by Respondents is misdirected. Rather, they contend, the focus of the dispute is the work being done by Consolidated and Twin. As General Counsel argues in its main brief (at p. 42):

> Whether or not longshoremen represented by ILA and employed by Respondent NYSA's members have

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[8] The evidence in the record as to stuffing or stripping of containers by ILA longshoremen on the docks of New York is relatively sparse in an otherwise voluminous record. However, that sparseness is quite explicable because apart from the issue as to whether containers brought to the docks by consolidators such as Consolidated and Twin were stuffed or stripped by ILA longshoremen, no one challenged that ILA longshoremen did stuff and strip containers on the docks. The record does show that NYSA companies did have numerous longshoremen on their payrolls designated for stuffing and stripping work as well as for loading containers aboard ship and unloading them from ships.

[9] In the *Consolidated* case before Judge Lacey, General Counsel made reference to "two parallel methods of operation . . . the containerization operations that have proceeded for many years at the premises—at the off-pier premises of various consolidators, such as Consolidated Express, Inc. and then there was a parallel interest of the ILA which originated on the piers." In the same proceeding, counsel for Consolidated took the position that the issue presented was, in effect, whether ILA could take stuffing and stripping work away from the employees of Consolidated Express because longshoremen did a great deal of that kind of work themselves.

> historically merely loaded and unloaded containers onto and from vessels or stuffed and stripped containers which were being consolidated by members of Respondent NYSA on their own account, is immaterial for, as shown, such work is separate and distinct from the work here in dispute and has been so regarded by both Respondents NYSA and ILA. Nor is it relevant in other situations involving other employers that Respondent ILA might be deemed to have a legitimate work preservation object in connection with containerization work affecting other employers outside the bargaining unit. For here "the precise work which is the focus of the dispute" is the work historically performed by Teamster employees or unrepresented employees in other units under a separate collective bargaining agreement and at [Consolidated's] and [Twin's] respective off pier premises. [Citing *International Longshoremen's Association (U.S. Naval Supply Center)*, 195 NLRB 273 (1972); *International Longshoremen's and Warehousemen's Union* (California Cartage, et al.), 208 NLRB No. 130, 85 LRRM 1300 (1974).]

In my view neither Respondents nor General Counsel and Charging Parties frame the issue here presented correctly. Rather, both beg the question. Certainly, it does not follow that because ILA has always stuffed and stripped containers, it may always and forever continue to assert its jurisdiction over all such work. Settled authority vindicates the right of a union to preserve work which has been in its domain and which it has not lost or abandoned. But certainly, ILA in view of its history would not be able to reassert jurisdiction, for example, over the stuffing and stripping of containers containing shippers'

loads after having expressly and explicitly abandoned that jurisdiction.

Similarly, General Counsel unduly constricts the issue by framing it in terms of stuffing and stripping work "performed by Teamster employees or unrepresented employees in other units under a separate collective bargaining agreement at [Consolidated's] and [Twin's] respective off pier premises." Work preservation agreements usually come into being because the work sought to be protected has been subjected to invasion or threat of invasion by others. Thus, in *National Woodwork* itself, the carpenters employed by the employer refused to install precut doors unless the doors were cut on the jobsite by the carpenters themselves. The carpenters had traditionally performed that work themselves. Yet, obviously the employees of the door manufacturers who comprised the National Work Manufacturers Association did that work also. Had the Supreme Court focused on the work being done by the employees of the door manufacturers at the latter's plants, as General Counsel urge be done here with respect to the operations of Consolidated and Twin, then obviously the Supreme Court would have reached a different result in *National Woodwork*. Indeed, the legitimacy of a work preservation objective would be virtually precluded in any situation where it could be established that other employees at other sites were doing or had done the work for which protection was being sought.

Rather, the issue here in the view of the undersigned is whether ILA, on behalf of the longshoremen it represented on the docks of the Port of New York, had lost or abandoned its jurisdiction over the work of stripping and stuffing NYSA owned or leased containers originating in the prescribed area around the Port of New York and containing LCL or LTL cargo, or whether its work history and

the surrounding circumstances generally warranted its efforts to preserve or recapture that work.

4. The "surrounding circumstances"

Before finally resolving that issue, consideration must be given to the "surrounding circumstances" set forth in *National Woodwork*, namely, the threat of displacement by the banned product or services, the history of labor relations between the Union and the employers who would be boycotted, and the economic personality of the industry.

Little need be said to clarify the record evidence as to the threat of displacement by the banned product or services or as to the economic personality of the industry. Even without reference to the record, common knowledge and common experience attest to the fact that the impact of containerization and other technology has had a dramatic and provocative effect on the industry resulting in repeated instances of labor strife and work stoppages. In addition, the need for labor, both on-pier and off-pier, has declined drastically and this has further exacerbated labor disputes.

Even as to instant dispute the threat of displacement by the banned product or services is graphically demonstrated in the record. Whatever the ultimate decision in the instant case, it is apparent that enterprises like Consolidated and Twin in the instant case, doing the work of consolidation and operating in the immediate area of ports where cargo is shipped or received, have had a surge of growth in recent years.[10] As is also demonstrated in the instant record, much of the work consolidators, like Consolidated and Twin, have been doing in recent years has

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[10] At least 14 such independent consolidators were named in the notice issued by the NYSA-ILA Contract Board on April 13, 1973.

consisted in the "unitizing" of LCL and LTL cargo and the stripping of that cargo in and from containers owned by, or leased to them, by NYSA carriers. If that work continues, the availability of that kind of work for ILA-represented employees on the docks is substantially diminished and, indeed, the record demonstrates that this has already occurred. On the other hand, if that work falls under the rubric of work preservation, as urged by Respondents, then the adverse impact, also demonstrated in this record, upon that portion of the operations of Consolidated, Twin and other similarly situated consolidators is equally apparent.

The third "surrounding circumstance" alluded to in *National Woodwork* has reference to the history of labor relations between the union and the employers who would be boycotted. In the context of the instant record, this element of the case furnishes more direct insight into the critical question posed by *National Woodwork,* namely, whether "the agreement and boycott were tactically calculated to satisfy union objectives elsewhere" or whether, as alternatively phrased, "the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees.

On this aspect of the case, the preponderance of the evidence in the record satisfies me, and I find, that the agreement and its maintenance were fundamentally directed to the labor relations between the employer-members of NYSA and ILA. The conflict between NYSA and ILA over containerization began with its emergence and continued without break thereafter. ILA dreaded the loss of employment which containerization foreboded for the longshoremen and related craftsmen whom it represented on the docks; NYSA employer-members for obvious economic reasons welcomed this work saving development.

These competing interests were adjusted but, as the evidence establishes, ILA continuously protested to NYSA that the latter's employer-members were not respecting the jurisdictional segments of containerization work to which ILA and NYSA had agreed. The consequence was, as already noted, a tightening up of the controlling regulations culminating in the ILA-Conasa Dublin Settlement.

The only protests and demands by ILA in this regard were addressed to NYSA. The record is devoid of any evidence that ILA ever made any direct demands upon Consolidated or upon Twin. Indeed, Consolidated and Twin acknowledge the absence of such demands. ILA did not seek to represent their employees or ask that they retain ILA-represented employees on their payroll.[11] So far as ILA was concerned, its sole demand was that the longshoremen on the docks perform the work of stuffing and stripping LCL and LTL containers owned or leased by NYSA employer-members. It was wholly immaterial to ILA, where that work was being done elsewhere, whether employees represented by other unions or unrepresented employees were doing the work, as in the case of Consolidated and Twin, or whether as in *Intercontinental Container Transport Corp.* v. *NYSA* and *ILA,* 426 F. 2d 884 (C.A. 2, 1970), that work was being done by ILA-represented employees working under a different collective-bargaining agreement. In both situations ILA's protest was that work was being siphoned away which

[11] Evidence is presented in the record as to a single incident as early as 1961 or 1962 when, according to General Counsel and the Charging Parties, ILA sought to organize the employees of U.S. Trucking Company. ILA argues that its activity at that time was only informational, and not for recognition. The evidence is insufficient to resolve the true nature of that activity which occurred more than 20 years ago and, in any event, resolution of that matter would not be of any great significance here.

under its historical tradition and contractual arrangements belonged to the employees of NYSA employer-members working on the docks.

In sum and on this state of the record I conclude and find that the boycott and agreements here challenged were addressed to the labor relations of NYSA members vis-a-vis their own employees.

5. The "loss or abandonment" contention

Notwithstanding the foregoing finding, I believe it appropriate to consider also the contention that ILA's conduct and its agreement with NYSA were nonetheless tactically calculated to satisfy ILA objectives elsewhere. As *National Woodwork* establishes (386 U.S., at 645) there need not be an actual dispute with Consolidated and Twin for ILA's activity to fall within a prohibited secondary category. The question still remains whether ILA had abandoned or lost its jurisdiction over the work in dispute here. Such loss or abandonment would preclude the reassertion of a paramount jurisdiction and would compel the inference that the real objective of ILA was to take away from Consolidated and Twin work which the latter were rightfully performing.

It is a matter of record that from the advent of containerization ILA claimed jurisdiction over the stuffing and stripping of containers as part of its tradition of "unitizing" cargo. As already noted, the precise extent to which ILA reserved its jurisdiction to stuff and strip containers in the 1959 agreement cannot be resolved here. But, certainly, it is clear that in ILA's view and in NYSA's view, as parties to that agreement, ILA did not surrender or abandon that jurisdiction. More importantly,

it is clear that both Consolidated and Twin were aware throughout the period of their operations that ILA was claiming jurisdiction over the work they were performing and that NYSA acknowledged that jurisdiction.

Thus, Consolidated was admittedly subjected to the stuffing and stripping of its containers on the docks by ILA personnel in 1966, about a year after Consolidated officially began its operations. This occurred during the pendency of the 1959 agreement and over 2 years before NYSA and ILA explicitly codified the Rules on Containers in their 1968 agreement. At the end of 1968, but before execution of that agreement which took place in February 1969, CEI was informed by officials of NYSA steamship companies that under existing rules all containers of LTL or consolidated cargo had to be stuffed and stripped on the docks. Twin was also aware of this state of affairs. Its containers were also stuffed and stripped on the docks by ILA personnel before execution of the 1968 agreement. The 1968 agreement, of course, codified the Rules on Containers explicitly and left no question as to ILA's continuing claim to recognition. Another instance of ILA rehandling of Consolidated's and Twin's containers occurred in 1971.

To be sure, notwithstanding this continuing claim and but for the few exceptions already noted, the record is clear, as hereinbefore found, that, generally speaking, Consolidated and Twin stuffed and stripped containers furnished them by NYSA carriers for LCL and LTL cargo without rehandling by ILA longshoremen. This continued until execution of the ILA-Conasa Dublin Supplement when the actions here challenged took place. Yet the fact that this pattern of events occurred does not, in and of itself establish that ILA had abandoned or surrendered

its jurisdiction.[12] As was the case in *National Woodwork* and in other legitimate work preservation cases, it is not at all unusual that more than one entity performs or has performed the work in dispute. This is particularly true where, as in the instant case, the work in dispute is only a portion of the operations of the two entities. Thus, here the stripping and stuffing was only part of the longshoremen's functions and, in the case of Consolidated and Twin, much of their operations consisted of receiving cargo from individual shippers and delivering cargo to individual consignees together with services incidental to these functions, an area of activity never sought by the ILA.

On the totality of the evidence I cannot find that ILA abandoned or surrendered its jurisdiction over the stuffing and stripping of LCL or LTL cargo in containers owned or leased by employer-members of NYSA with whom ILA had a bargaining and contractual relationship. Concededly ILA, like NYSA, was considerably less than vigilant in asserting and insisting upon ILA's prerogative in this regard. The fact is, however, and I find that it did throughout the entire period here under consideration press its claim in this regard upon NYSA, the contracting employer.

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[12] Documents introduced into evidence by Respondents, consisting of dock receipts and tally sheets purported to indicate that ILA had rehandled Consolidated's containers on the docks. These documents had reference only to the latter months of 1972. I conclude, as did Judge Lacey, that the purported rehandling did not take place, and, indeed, Respondents do not presently argue to the contrary. On the other hand, the very fact that such documents were kept in the regular course of business is cogent evidence that the jurisdiction of ILA to engage in such rehandling was acknowledged not only by ILA but also by the NYSA employer-members for whom the documents were prepared as part of their office records.

Any conclusion that ILA's activities were tactically calculated to achieve ILA objectives elsewhere can only be premised on the proposition that Consolidated and Twin were adversely affected, insofar as the stuffing and stripping portion of their overall operations were concerned. This, however, was an inevitable result of ILA's pressure upon NYSA with whom it had its contractual and bargaining relationship and does not, as *National Woodwork* established, convert primary action into action with a secondary impact.

5. The cited precedents

As previously noted, each side to this controversy cites a number of precedents from the plethora of cases dealing with secondary boycott and hot cargo situations. Because these cases turn largely on their individual facts, they are of minimal aid in this situation. But all parties place special emphasis on a selected few of these cases and brief reference to these selected cases is warranted.

General Counsel and the Charging Parties place special emphasis on *International Longshoremen's Association (U.S. Naval Supply Center)*, 195 NLRB 273 (1972), and *International Longshoremen's and Warehousemen's Union (California Cartage Company)*, 208 NLRB No. 130, 85 LRRM 1300 (Feb. 1974).

The *Naval Supply Center* case involved an allegation of a Section 8(b)(4)(B) violation only. In significant respects the situation there was quite similar to the situation presented in the instant proceedings; in other significant respects it differed. The facts in *Naval Supply Center* showed that the Supply Center was engaged in Norfolk, Virginia in the receipt, storage and transshipment of ocean cargo through the Ports of Hampton Roads, Virginia. For more than 30 years it had shipped from and received at its

own docks U.S. Department of Defense break-bulk cargo by either commercial vessels or Department of Defense vessels. Supply Center's own employees, represented since 1946 by IAM, performed the loading or unloading of break-bulk cargo at the Supply Center's docks. Since 1967, however, the Supply Center has also shipped Department of Defense cargo by containers owned by ocean-going companies. The containers were stuffed by the Supply Center's own employees at its own docks and then trucked to commercial terminals in the ports of Hampton Roads where they were put aboard ship by ILA-represented employees of stevedoring companies. ILA had a 1968 agreement with the Hampton Roads Maritime Association, the counterpart of NYSA here. Naval Supply Center was not a member of that Association. Nevertheless, ILA invoked a clause of its agreement which provided, also as here, that containers, owned or leased by employer-members of the Association, with exceptions like those in the instant cases, were to be stuffed and stripped by ILA longshore labor. In December of 1970 ILA informed Association members that it would demand liquidated damages in the amount of $1,000 from Association members for each container such member permitted to be stuffed or unstuffed by Supply Center employees, and further threatened to refuse to handle the particular containers involved. A few months later ILA reiterated its threats and "also demanded all work involved in the loading at the Supply Center of commercial ships owned and controlled by signatories to the ILA contract under threat of refusing to load cargo when the ships called at other commercial ports" (195 NLRB, at 273). ILA also took further action to implement these demands. Upon these facts, essentially, the Board found a violation of Section 8(b)(4)(B).

Concededly, the facts in *Naval Supply Center* are quite similar to those presented here. But there are marked

and pivotal differences. The Supply Center had always and exclusively handled break-bulk cargo at its own docks with its own employees; only container cargo was shipped to commercial terminals in the ports of Hampton Roads where ILA personnel operated. Yet, ILA not only demanded all work at the ports of Hampton Roads in the handling of containers owned and controlled by signatories to its contract with the Association; ILA also demanded all work involved in loading ships at the Supply Center, a separate area, an area where ILA-represented personnel had never operated and to which "the charter jurisdiction of ILA . . . had not in practice been extended" (at 274). As the Board correctly observed, Naval Supply Center could only meet with ILA's demands "if the U.S. Navy were to replace its own employees represented by the IAM with ILA members" (*ibid.*). Accordingly, the Board concluded, the U.S. Navy was really the primary employer and the victim of a secondary boycott. It was in this connection that the Board carefully noted "that the restrictive provisions in the ILA-Association collective-bargaining contract . . . may in other circumstances have valid work preservation objectives [citing *Intercontinental Container Transport Corporation, supra,* 429 F. 2d 884]," but that this principle could not be "used as a shield for conduct aimed not at work preservation but at acquisition of work historically performed by employees in another work unit" (*ibid.*).

As indicated earlier, nothing in the instant case suggests —indeed, the contrary is shown—that ILA sought to replace with its own personnel the employees who did the work for Consolidated and Twin at their respective sites. In fact, as the Intercontinental case demonstrates, ILA in the New York area resisted the siphoning off of work from its longshoremen on the dock area even where the off-port enterprise doing the work employed ILA-represented personnel.

Decision of Administrative Law Judge, Arnold Ordman, December 9, 1974.

The recent decision of the Board in the *California Cartage* case, *supra,* which involved alleged violations of both Section 8(b)(4)(B) and Section 8(e), is particularly emphasized by General Counsel and the Charging Parties. There the union involved was International Longshoremen's and Warehousemen's Union (ILWU) and the contracting employer association was Pacific Maritime Association. On the Pacific coast, like the Atlantic coast, the advent and growth of containerization raised serious problems of accommodation on the waterfront and, as here, so there, compromises were made in agreements consummated between ILWU and PMA. As the *California Cartage* decisions demonstrates, however, the approach of ILWU differed from that of ILA and that difference found expression in the ILWU-PMA agreements.[13]

Without recounting all the facts of *California Cartage* in detail inasmuch as they for the most part parallel the facts in the instant cases, the critical facts upon which the Board apparently predicated its decision should be noted. In 1960 ILWU and PMA entered into a Modernization and Mechanization Agreement. Under that Agreement PMA members gained the right to use new equipment to increase productivity and improve methods for cargo handling. In addition, as the Board found (sl. op., p. 4), the Agreement provided that:

> In the future, non-longshoremen delivering merchandise to the dock would not be required to place the cargo on 'the skin of the dock' to be reloaded by other longshoremen on other pallets for loading aboard ship.

[13] A more extensive and detailed discussion of the different approaches to the containerization problem made by the ILA on the east coast and by ILWU on the west coast may be found in the article by Professor Ross, "A Tale of Two Unions," cited at fn. 3 of this Decision.

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> *It was agreed that the Union would divest itself of this type of work and longshoremen would load truckers' pallets with the merchandise directly on the ship. Cargo could be unitized in one way or another . . . boxed, crated, banded, glued, or palletized in large or small containers.* [Emphasis supplied.]

In return for the relinquishment by ILWU of the work it formerly did, it was agreed, *inter alia,* that PMA members would establish and did establish a substantial mechanization fund to be used for longshoremen's pensions, retirement and unemployment.[14]

As the Board further found (sl. op., p. 6), containerization grew in the decade of the 1960's and ILWU became unhappy with the concessions it had made in the 1960 Agreement. In 1970 and 1972 ILWU sought and obtained supplemental agreements with PMA providing, in effect, that all stuffing or unstuffing of containers to be loaded on or unloaded from ships docking in the Pacific Coast ports, except for shippers' loads and door-to-door deliveries, was to be performed by ILWU personnel.

In sum, the Board concluded in the *California Cartage* case that Section 8(b)(4)(B) and Section 8(e) had been violated. The Board rejected the claim that stuffing and unstuffing containers was traditionally unit work and that the attempt to preserve or reclaim that work for ILWU-represented employees was primary lawful activity under *National Woodwork.*

The Board recognized, of course, that the loss of work on the docks due to containerization was "certainly a matter of legitimate concern to the ILWU" (sl. op., p. 7). Nonetheless, the Board rejected the claim of work preser-

[14] In the instant cases the record shows that ILA in 1964 obtained a Guaranteed Annual Wage arrangement from NYSA.

vation. The Board said (*ibid.*):

> Initially, it is clear from the language of the Supplements that the ILWU's claim to container stuffing work is not limited to work generated by members of PMA, *but extends broadly to all containers entering or leaving Pacific coast docks, whether or not the owners of the containers are members of PMA and statutory employers of employees within the longshore unit represented by ILWU.* [Emphasis supplied.]

The Board also made special note of the fact that "[t]o a large extent the make-work rights claimed by longshoremen with respect to cargo placed on the dock were effectively bargained away in 1960.[15]

In view of the foregoing the extent to which *California Cartage* is precedent for the position of General Counsel and the Charging Parties in this case is, at best, speculative. While it is urged here that the 1959 agreement between ILA and NYSA was the equivalent of the ILWU-PMA agreement of 1960 and that ILA in its 1959 agreement bargained away the rights of its longshoremen to containerization, that conclusion is obviously not apparent from the ambiguous wording on the face of the 1959 agreement. Moreover, ILA and NYSA did not consider this to be the case, and Consolidated and Twin were apprised almost from the beginning of their respective operations that this was not the case. Certainly, unlike the situation in *California Cartage,* the instant proceedings do not present a situation where the Union bargained away certain rights in an agreement and, 10 years later, belatedly

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[15] This included, as shown above, not only the cargo put into containers but also break-bulk cargo which was "boxed, crated, banded, glued or palletized . . . ."

reasserted them. In the instant cases ILA, although altogether laggard in protecting its jurisdiction to the containerization work under consideration, never abandoned that jurisdiction. And, further ILA, unlike ILWU, never sought to obtain the work of stuffing all containers passing through the Port of New York but only the work of stuffing containers owned or leased by NYSA members, employers of employees in the dock personnel unit represented by ILA. In these circumstances the value of *California Cartage* as precedent for the instant case is substantially diluted. Rather, what is really reflected here is the different approaches toward containerization adopted by ILWU on the west coast and by ILA on the east coast. See, again, Ross: *A Tale of Two Unions, supra,* nn. 3, 13.

Respondents for their part place strong reliance for vindication of their position on the decisions, *inter alia,* in *International Container Transport Corporation* v. *New York Shipping Association, Inc. and International Longshoremen's Association,* 426 F. 2d 884 (C. A. 2, 1970), herein referred to as the *ICTC* case, and in *American Boiler Manufacturers Assn.* v. *N.L.R.B.,* 404 F. 2d 547 (C.A. 8, 1968), cert. denied, 398 U.S. 960 (1970), affirming the Board's decision reported at 167 NLRB 602 (1967).

In the *ICTC* case the specific Rules on Containers incorporated in NYSA-ILA 1968 agreement here involved came under attack. There, the plaintiff an independent consolidator, like Consolidated and Twin here (except that plaintiff's employees were represented by ILA in a separate collective-bargaining unit), brought a civil action against ILA and NYSA alleging that the enforcement of the Rules on Containers and the imposition of $250 penalties for breach of these rules constituted a violation of the Sherman

Act. The Court rejected this claim. Although General Counsel and the Charging Parties correctly point out that the *ICTC* suit was an antitrust action and not an unfair labor practice proceeding under the National Labor Relations Act, the Court's opinion and decision cannot be wholly discounted on this ground. Citing the *National Woodwork* decision of the *Supreme Court,* the Second Circuit ruled, consistent with uniform Board authority, that "the preservation of jobs is within the area of proper union concern (426 F. 2d at 887)," and held further that "[u]nion activity having as its object the preservation of jobs for union members is not violative of antitrust laws" (*id.,* at 887-888, citing in this regard *Amalgamated Meat Cutters* v. *Jewel Tea Company,* 381 U.S. 676 (1965)). The Court pointed out, in addition, that the case before it was not a situation where the containerization provisions of the collective-bargaining agreement were the kind of combination between union and employers condemned in *Allen Bradley Co.* v. *Local Union No. 3,* 325 U.S. 797 (1945). Rather, the Court held that this was a situation where ILA, acting solely in its self-interest, forced reluctant employers to yield to its demand that ILA-represented employees retain the work specified in the Rules on Containers. Accordingly, the Court's conclusion was that the challenged clauses were within the labor exemption to the antitrust laws. *Id.,* at 888. At the very least, therefore, it would appear that, on facts quite like those in the instant proceedings, the Court of Appeals for the Second Circuit, applying such authorities as *National Woodwork* and *Jewel Tea,* concluded that the Rules on Containers in the 1968 agreement were the product of ILA's efforts for "the preservation of work traditionally performed by longshoremen covered by the agreement." *Id.,* at 887.

While the *ICTC* decision is, of course, not controlling here, neither, in my view, can it be disregarded.[16]

American Boiler, supra, is cited to establish the proposition that work preservation rules may be used not only to preserve work, but to reacquire work which has been siphoned away. Essentially, it is cited in response to the contention that because Consolidated and Twin have regularly stuffed and stripped LCL and LTL cargo into and from containers owned or leased by NYSA carriers, Consolidated and Twin have a parallel tradition in that regard, ILA-represented employees no longer can claim exclusivity in the performance of that function, and, hence, work preservation is not a legitimate justification for the conduct and agreements here challenged. See footnote 9, *supra.*

American Boiler, as shown by both the Board and Court decisions therein, plainly rebuts this contention. In that case a "fabrication" clause was negotiated by a pipefitters' union after packaged boilers with trim piping attached, became dominant, thereby eliminating a very substantial portion of the work done by the employees whom the union represented at jobsites. Packaged boilers by 1963 accounted for between 60 percent to 85 percent of all boiler installations. The "fabrication" clause provided that all fabrication be performed at the jobsite, thereby reacquiring or recapturing work which had previously been done there but now was incorporated in packaged boilers which

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[16] Respondents also cite an administrative determination made in 1970 by a Regional Director of the Board and upheld on appeal by the Office of the General Counsel not to issue a complaint in a situation which, so far as appears, might be parallel to the instant cases. For obvious reasons and on settled authority, such an administrative determination or determinations are neither relevant to, or in any way dispositive of, the issues here presented.

required virtually no assembly at the jobsite. Both the Board and the Court agreed that the "fabrication" clause was legal and that the sole objective of the union in obtaining agreement to the clause was "to preserve and to reacquire such work for the unit employees of the contracting employers." 167 NLRB at 603. The fact that 60 percent to 85 percent of the packaged boilers had been regularly assembled by employees of manufacturers located elsewhere was not dispositive. The "fabrication" clause, the Board held, with court approval, "met the 'touchstone' of being 'addressed to the labor relations of the contracting employer *vis-a-vis* his own employees,' and the evidence does not show that the tactical object of the clause was the packaged boiler manufacturers or any other secondary employers." *Ibid.*

The Court, in affirming the Board, noted that a work preservation clause may be used both "to preserve work currently being performed by unit members and to reacquire that portion lost . . ." 404 F. 2d 554.

American Boiler furnishes solid support for Respondents' position insofar as it effectively repudiates the proposition that exclusivity of performance is a prerequisite to a claim of work preservation or that work siphoned away, even in substantial amounts, cannot be reacquired or recaptured. The Board has consistently rejected such claims. On the other hand, it does not follow, nor has it been held, that a work preservation clause can be validly used to obtain work which the unit employees had never performed or work which may have been performed but has been completely lost before the work preservation clause is negotiated. *California Cartage,* among other decisions, is to the contrary.

As indicated in the four cases here discussed, each of the decisions turns on its own facts. As stated earlier, the same can be said of the many other cases cited by the

parties to this proceeding. Extended discussion of all those cases would serve no useful purpose.

7. Summation

The decision in the consolidated cases presented here must be made on the evidence presented here. As *National Woodwork* dictates, the critical determinant is whether ILA's objective was preservation of work for the employees it represented on the docks of the Port of New York, or whether the agreements and boycott were tactically calculated to satisfy ILA's objectives elsewhere—in the context of the instant case, to obtain the work being done by Consolidated and Twin at their respective premises. Phrased another way, were ILA's boycott and its agreement addressed to the labor relations of the employer-members of NYSA *vis-a-vis* their own employees? Necessarily involved herein also are subsidiary questions such as whether ILA can be said to have lost or abandoned its jurisdiction over the work in controversy. If it has, then its conduct here, like the conduct of ILWU in *California Cartage,* falls within the ban of Section 8(b)(4)(ii)(B) and Section 8(e). If it has not, then I am satisfied that, like the pipefitters union in *American Boiler,* ILA is entitled to recapture or reacquire the work in controversy to the extent it has been siphoned away. The hurt caused thereby to Consolidated and Twin does not convert legitimate primary activity into activity with a proscribed secondary objective. *National Woodwork,* 386 U.S., at 627.

A great deal of evidence, oral and documentary, voluminous in scope, has been adduced by the parties and has been summarized herein. The burden of establishing the violations alleged in the consolidated complaints rests, of course, upon the General Counsel. On the basis of the whole record, and on the basis of the subsidiary findings

and analysis hereinbefore set forth, I find that the preponderance of the evidence does not warrant a finding that ILA violated Section 8(b)(4)(ii)(B) of the Act, or a finding that ILA and NYSA violated Section 8(e) of the Act. More specifically, I find that the preponderance of evidence in the record fails to establish that ILA ever abandoned, lost, or surrendered its jurisdiction over the work in controversy. I find further that ILA's objective at all times relevant was to preserve the work in question for the NYSA employees it represented on the docks of the Port of New York and ILA's boycott and its agreements were addressed to the labor relations of the employer-members of NYSA *vis-a-vis* their own employees.

Accordingly, I conclude that the consolidated complaints in the instant proceeding should be dismissed.[17]

Conclusions of Law

1. New York Shipping Association, Inc., Consolidated Express, Inc. and Twin Express, Inc. are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

[17] While not material in the light of this disposition, reference should be made to the defense, urged by Respondents and limited to the two cases in which Twin is the Charging Party, that the consolidated complaints are time-barred by the 6-month limitation of Section 10(b) of the Act and that the doctrine of laches should also be applied here. I find the defense as to Section 10(b) and laches to be wholly without merit. In the Twin Express proceeding before Judge Lacey, the parties stipulated that subsequent to May 2, 1973, the date 6 months before the filing of unfair labor practice charges by Twin, stipulated damages were imposed by ILA against TTT for violations of the Rules on Containers. These damages, had reference to violations relating to Twin as well as to others. This continuing enforcement of the Rules on Containers would, if the Rules were otherwise unlawful, defeat any contention that the existence of the Rules more than 6 months before the filing of charges prevented the application of the unfair labor practice provisions of the Act. The defense of laches is, of course, not available on settled authority to suits brought by the United States or any of its agencies to enforce a public right.

2. International Longshoremen's Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The preponderance of the evidence in the record does not support a finding that International Longshoremen's Association, AFL-CIO, engaged in violations of Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended, as alleged in the consolidated complaints herein.

4. The preponderance of the evidence in the record does not support a finding that International Longshoremen's Association, AFL-CIO, and New York Shipping Association, Inc. engaged in violations of Section 8(e) of that Act, as alleged in the consolidated complaints herein.

Upon the foregoing findings of fact, conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act I recommend the following:

ORDER[18]

The complaint in this proceeding is dismissed in its entirety.

Dated at Washington, D.C. Dec 9 1974

ARNOLD ORDMAN
Arnold Ordman
Administrative Law Judge

[18] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

Decision of The National Labor Relations Board, 221 NLRB No. 144, December 4, 1975.

On December 9, 1974, Administrative Law Judge Arnold Ordman issued the attached Decision in this proceeding. Thereafter, General Counsel, Charging Parties Consolidated Express, Inc.,[1] and Twin Express, Inc.,[2] and Intervenor Truck Drivers Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America,[3] filed exceptions and supporting briefs, and Respondent New York Shipping Association, Inc.,[4] filed a brief in support of the Administrative Law Judge's Decision. Respondents International Longshoreman's Association, AFL-CIO,[5] and NYSA filed answering briefs.[6]

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.[7]

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[1] Hereafter referred to as Consolidated.

[2] Hereafter referred to as Twin.

[3] Hereafter referred to as Intervenor or Local 807.

[4] Hereafter referred to as NYSA.

[5] Hereafter referred to as ILA.

[6] In view of our findings herein, Consolidated's and Twin's motions to strike in its entirety ILA's brief in support of the Administrative Law Judge's Decision, Consolidated's motion to strike portions of NYSA's brief in support of the Administrative Law Judge's Decision, and NYSA's reply to exceptions are hereby denied. In so finding, we have disregarded movants' arguments submitted in contravention to our ruling of April 2, 1975, by which we denied their requests for permission to file reply briefs to ILA's and NYSA's briefs in support of the Administrative Law Judge's Decision.

[7] Respondent NYSA's and Charging Party Consolidated's requests for oral argument are hereby denied as, in our opinion, the record in this case, including the exceptions and briefs, adequately presents the issues and positions of the parties.

Decision of the National Labor Relations Board, 221 NLRB No. 144, December 4, 1975.

In these consolidated cases, the complaints allege that Respondent ILA has threatened, coerced, and restrained NYSA and its employer-members to cease doing business with Consolidated and Twin, in violation of Section 8(b)(4)(ii)(B) of the Act. The complaints also allege that Respondents ILA and NYSA have violated Section 8(e) of the Act by maintaining, giving effect to, and enforcing certain contracts and agreements between them with respect to the business operations of the Charging Parties.

Consolidated and Twin are non-vessel-owning common carriers engaged in the business of containerizing less-than-container-load (LCL) or less-than-trailer-load (LTL) cargo for shipment between Puerto Rico and their respective inland facilities located within 50 miles of the Port of New York. In the shipping trade, they are otherwise known as "consolidators," companies which handle LCL goods for customers wishing to ship their goods to or from a given destination. At their off-pier facilities, Consolidated and Twin unitize or consolidate the crates of their various customers into large containers or trailers which are provided to them by the steamship companies which service Puerto Rico. These consolidators then truck the trailers to the pierside facilities of the steamship companies who then load the containers onto their ships bound for Puerto Rico. Conversely, when ships carrying goods from Puerto Rico arrive in the Port of New York, the steamship companies unload the incoming containers, including the LCL containers, which the consolidators then truck to their off-pier facilities where the consolidators open the containers and separate the crates for delivery to the ultimate consignees. In the trade, the act of filling a container with cargo is known as "stuffing," and the act of removing cargo from a container is known as "stripping" or "unstuffing."

Consolidated began its business operations under its present identity in 1965, but it asserts that it is the successor of Valencia-Baxt Express, Inc., which began off-pier consolidation operations in 1949.[8] Prior to August 1973, Consolidated did not have its own trucking employees, but contracted with the United States Trucking Company, whose employees were represented by Intervenor Local 807, to do all stuffing, stripping, loading, and delivery work at, to, and from Consolidated's off-pier facilities. In August 1973, Consolidated terminated its relationship with United States Trucking Company, and Consolidated's own employees, also represented by Local 807, have performed the work since.

Twin has been in business as an off-pier consolidator since 1967. Until 1969, it utilized unrepresented employees provided by two trucking companies which contracted with Twin to perform stuffing, stripping, and delivery of cargo. Since 1969, Twin's own employees, represented by Intervenor's sister local, and the employees of independent trucking companies, including a company whose employees are represented by Intervenor, have performed the bulk of Twin's consolidation and delivery work.

Neither Consolidated nor Twin has ever belonged to Respondent NYSA, an incorporated association of employers engaged in various operations involving the shipment of cargo and freight and the transportation of passengers in and out of the Port of New York. NYSA conducts collective-bargaining negotiations and enters into bargaining agreements on behalf of its employer-members, including the three steamship companies operating in

[8] In view of our findings herein, we need not decide whether Consolidated is a successor of Valencia-Baxt Express, Inc., for the purposes of this case.

trade between the Port of New York and Puerto Rico, i.e., Sea-Land Service, Inc.,[9] Seatrain Lines, Inc.,[10] and Transamerican Trailer Transport, Inc.[11] In the course of its business operations as a non-vessel-owning common carrier, Consolidated has utilized the carrier services provided by these three shipping lines. Twin has similarly done business with Sea-Land and TTT, but not Seatrain. Since their ships are specifically designed to carry certain kinds of large containers or trailers, these shipping companies furnish empty containers to their customers in order to permit their customers to avail themselves of the shipping companies' carrier services. In the past, the shipping companies have provided these containers to all their customers, including manufacturers and beneficial owners of the cargo to be shipped. Like any other shipper of goods, Consolidated and Twin cannot utilize the shipping companies' transport services to and from Puerto Rico unless they acquire those empty containers.

NYSA belongs to the Council of North American (*sic*) Shipping Associations.[12] Since 1970, CONASA has had the authority to negotiate and enter into collective-bargaining agreements on behalf of its association members.

The record discloses that employees represented by Respondent ILA have traditionally performed the actual work of loading and unloading cargo, however contained, on and off ships belonging to NYSA's employer-members who operate out of the Port of New York. Since World War II, however, the introduction of increasingly larger containers, currently as large as 8 x 8 x 40 feet, has resulted

[9] Hereafter referred to as Sea-Land.

[10] Hereafter referred to as Seatrain.

[11] Hereafter referred to as TTT.

[12] Hereafter referred to as CONASA.

in fewer individual cargo units for the longshoremen to load onto and off the ships. In 1958, ILA protested the use of Dravo containers, boxes which were 8 cubic feet in size, and commenced a strike against NYSA which resulted in the 1959 agreement with NYSA. Section 8 of the 1959 memorandum of settlement was entitled "Containers—Dravo Size or Larger" and provided:

> a. Any employer shall have the right to use any and all type of containers without restriction or stripping by the union.
>
> b. The parties shall negotiate for two weeks after the ratification of this agreement, and if no agreement is reached shall submit to arbitration . . . the question of what should be paid on containers which are loaded or unloaded away from the pier by non-ILA labor, such submission to be within 30 days thereafter.
>
> c. Any work performed in connection with the loading and discharging of containers for employer members of NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates.

After the 1959 agreement, advancement in the development of larger containers accelerated. In 1967, the first fully containerized ships, specifically designed and constructed to carry large containers, were introduced into the shipping trade. As fewer cargo units reached the piers, there was a proportionate decrease in loading and unloading work for the longshoremen represented by Respondent ILA. Whenever ILA-NYSA collective-bargaining agreements expired, disputes marked by work stoppages erupted. During these disputes, ILA members stripped and restuffed

LTL containers shipped by Consolidated and Twin as the containers crossed the piers. ILA's rehandling of these LTL containers never lasted more than 2 or 3 weeks at a time, and, with these few exceptions, Consolidated's and Twin's LTL containers went through the Port of New York and were loaded for shipment without interference by ILA in the way of stripping or restuffing. In 1967, ILA demanded that its longshoremen stuff and strip all containers crossing the piers, and a 57-day strike ensued. In 1969, in an attempt to resolve their differences, ILA and NYSA entered into the following agreement known as the "Rules on Containers":

> Rule 1. Definitions and rule as to containers covered.
> Stuffing—Means the act of placing cargo into a container.
>
> Stripping—Means the act of removing cargo from a container.
>
> Loading—Means the act of placing containers aboard a vessel.
>
> Discharging—Means the act of removing containers from a vessel.

These provisions relate solely to containers meeting each and all of the following criteria:

> (a) Containers owned or leased by employer-members (including containers on wheels) which contain LTL loads or consolidated full container loads.
>
> (b) Such containers which come from or go to any person (including but not limited to a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound

cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo.

(c) Such containers which come from or go to any point within a geographical area of any port in the North Atlantic District described by a 50-mile circle with its radius extending out from the center of each port.

Rule 2. Rule of stripping and stuffing applies to such containers.

A container which comes within each and all of the criteria set forth in Rule 1 above shall be stuffed and stripped by ILA longshore labor. Such ILA labor shall be paid and employed at longshore rates under the terms and conditions of the General Cargo Agreement. Such stuffing and stripping shall be performed on a waterfront facility, pier or dock. No container shall be stuffed or stripped by ILA longshore labor more than once. Notwithstanding the above provisions, LTL loads or Consolidated Container loads of mail, of household goods with no other type of cargo in the container, and of personnel (*sic*) effects of military personnel (*sic*) shall be exempt from the rule of stripping and stuffing.

Rule 3. Rules on No Avoidance or Evasion.

• • • • •

(e) Failure to stuff or strip a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 2 shall also be considered a violation of the contract. If for any reason a container is no

longer at the waterfront facility at which it should have been stuffed or stripped under the rules, then the steamship carrier shall pay, to the joint Container Royalty Fund liquidated damages of $250 per container which should have been stuffed or stripped. Such damages shall be used for the same purposes as the first Container Royalty is used in each port. If any carrier does not pay liquidated damages within 30 days after exhausting its right to appeal the imposition of liquidated damages to the Committee provided in (g) below, the ILA shall have the right to stop working such carrier's containers until such damages are paid.

In 1970, NYSA agreed to increase the liquidated damages imposed upon the offending carriers to $1,000 for each offense. The disputes continued, however, and in 1973 CONASA and ILA met and entered into the Dublin Supplement which provides in pertinent part as follows:

Enforcement of Rules on Containers.

• • • • •

1. (a) All outbound (export) consolidated or LTL container loads (Rule 1 containers) shall be stripped from the container at pier by deepsea ILA labor and cargo shall be stuffed into a different container for loading aboard ship.

1. (b) All inbound (import) consolidated or LTL cargo (Rule 1 containers) for distribution shall be stripped from the container and the cargo placed on the pier where it will be delivered and picked up by each consignee.

2. No carrier or direct employer shall supply its containers to any facilities operated in violation of the

Rules on Containers including but not limited to a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder who is either a consolidator or a distributor. No carrier or direct employer shall operate a facility in violation of the Rules on Containers which specifically require that all containers be stuffed or stripped at a waterfront facility (pier or dock) where vessels normally dock.

A list shall be maintained of consolidation and distribution stations which are operated in violation of the Rules for the information of all carriers and direct employers. Any container consolidated at or distributed from such facilities shall be deemed a violation and subject to the rules on stuffing and stripping.

Following the execution of the Dublin Supplement, assessments and threats of further assessments resulted in Sea-Land and TTT ceasing to furnish Consolidated and Twin with containers necessary for the continued operation of their consolidation businesses. Seatrain similarly discontinued furnishing containers to Consolidated. TTT attempted to furnish them "foreign" trailers, i.e., containers which TTT leased from railroad pools and which do not carry TTT's name. But even these containers were stripped and restuffed by ILA labor at the piers.

Finally, on April 13, 1973, NYSA and ILA issued a joint notice to all NYSA members, announcing that employer-members had been assessed liquidated damages for violating the Rules on Containers and that LTL containers had been stuffed and stripped at the premises of 14 named employers who did not employ ILA labor. Consolidated and Twin were among the 14 employers listed in the notice.

Shortly after the circulation of the above-mentioned notice, Consolidated and Twin filed the instant charges alleging violations of Section 8(b)(4)(ii)(B) and 8(e) of the Act. Thereafter, complaints issued, and the General Counsel, pursuant to Section 10(1) of the Act, sought and obtained temporary injunctions against ILA and NYSA in both the Consolidated cases[13] and the Twin cases.[14] All four cases were consolidated and submitted to the Administrative Law Judge on the basis of stipulated records consisting of the records compiled in the earlier injunction proceedings before the United States District Court of New Jersey, and supplemented by affidavits furnished by the parties, particularly Intervenor Local 807 which did not participate in the proceedings before the district court.

The Administrative Law Judge correctly noted that the disposition of this case turns on whether ILA's activities and its contractual agreements with NYSA had primary or secondary objectives. If ILA's activities and its agreements with NYSA were designed to preserve work to which ILA-represented employees working in the Port of New York were entitled, then both the activities and the contractual arrangements would be primary in purpose and, therefore, would not be unlawful. However, if ILA's real object was to obtain either work traditionally performed by employees not represented by ILA or work to which ILA had abandoned all claims, then the pressures on NYSA members and the contractual arrangements

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[13] *Balicer* v. *International Longshoremen's Association, AFL-CIO, and New York Shipping Association, Inc.*, 364 F.Supp. 205 (D.C.N.J., 1973), affd. 491 F.2d 748 (C.A. 3, 1973).

[14] *Balicer* v. *International Longshoremen's Association, AFL-CIO, and New York Shipping Association, Inc.*, 86 LRRM 2559 (D.C.N.J., 1974).

would have a secondary object and would violate Section 8(b)(4)(ii)(B) and 8(e), respectively. As the United States Supreme Court instructed in *National Woodwork Manufacturers Association* v. *N.L.R.B.*, "[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees."[15]

The Administrative Law Judge found that ILA did not seek to represent employees working for Consolidated and Twin, nor did it ask those companies to retain ILA-represented employees. Rather, he found, ILA only demanded that longshoremen on the dock perform the work of stuffing and stripping LCL and LTL containers owned or leased by NYSA members, work which belonged to them and which they had never surrendered, abandoned, or lost. Thus, he concluded, the ILA boycott and the contractual agreements with NYSA were addressed to the labor relations of NYSA employer-members vis-a-vis their own employees; and, if Consolidated and Twin were adversely affected, it was an inevitable result of lawful primary action. We do not agree with this conclusion.

The Administrative Law Judge correctly recognized that, in order to properly evaluate the validity of ILA's claim to the work, "it is essential to define with some precision the work in controversy since that is the predicate upon which the issue of work preservation must turn." It is clear from the record that the work in controversy here is the LCL and LTL container work performed by Consolidated and Twin at their own off-pier premises. It is with this precise work in mind that the contentions of the parties must be evaluated.

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[15] 386 U.S. 612, 644-645 (1967). See also *International Longshoremen's Association, Local 1248, AFL-CIO (U.S. Naval Supply Center)*, 195 NLRB 273 (1972).

The traditional work of the longshoremen represented by ILA has been to load and unload ships. When necessary to perform their loading and unloading work, longshoremen have been required to stuff and strip containers on the piers.[16]

Similarly, for many years, maritime cargo has been sorted and consolidated off the docks by companies employing teamsters and unrepresented employees. With the advent of vessels designed exclusively to carry the large containers presently in use, these consolidating companies, such as Consolidated and Twin, have continued to consolidate shipments into containers prior to their placement aboard the vessels. The consolidators generate such work themselves, performing it not on behalf of the employer-members of NYSA but for their own customers who have goods to ship. Furthermore, they perform this consolidation work at their own off-pier premises, with their own employees who are outside the unit represented by ILA, and who fall within the coverage of separate collective-bargaining agreements, under which they are represented by other labor organizations. It is clear, therefore, that Consolidated and Twin have traditionally been engaged in the work of stuffing and stripping containers such as are here in controversy.

From the foregoing and the record as a whole, it is clear that the on-pier stripping and stuffing work performed by longshoremen as an incident of loading and unloading ships does not embrace the work traditionally performed by Consolidated and Twin at their own off-pier premises.

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[16] While the record does not reveal the extent to which longshoremen have engaged in stripping and stuffing containers, it is clear that longshoremen have performed these functions on the piers on behalf of shippers since the advent of containerization.

It does not fall within ILA's traditional role to engage in make-work measures by insisting upon stripping and stuffing cargo merely because that cargo was originally containerized by nonunit personnel. Yet, ILA's demand here could only be met if the work traditionally performed off the pier by employees outside the longshoremen unit were taken over and performed at the pier by longshoremen represented by ILA. Thus, our analysis, as set forth in *U. S. Naval Supply Center, supra,* is apposite here. As in *U. S. Naval,* ILA here sought to acquire the work which traditionally had been performed by employees in other work units. Accordingly, consistent with *U. S. Naval,* the *National Woodwork, supra,* and *American Boiler Manufacturing Association* v. *N.L.R.B.*[17] cases are distinguishable from the instant case since, in those cases, the very work claimed had once been performed, exclusively, by employees in the units represented by the respondent organizations therein.

In addition, there is compelling evidence that the agreements between ILA and NYSA were not in reality solely concerned with the preservation of the work to which ILA claims it was entitled. ILA and NYSA have steadfastly asserted that their agreements, and the maintenance thereof, were calculated to prohibit NYSA employer-members from furnishing containers to consolidators, thus preserving for the longshoremen work which they would perform were the containers not provided by their employers to consolidators. However, the record reveals that, even if Consolidated and Twin obtained trailers or containers not owned or leased by NYSA employer-members, those "foreign" containers would still be considered as falling within the provisions of the Rules on Containers and the Dublin

[17] 404 F.2d 547 (C.A. 8, 1968), cert. denied 398 U.S. 960 (1970).

Supplement, and the stuffing and stripping of such containers would likewise be claimed by ILA.[18]

Furthermore, assuming that ILA had a superior claim prior to 1959 to the stuffing and stripping work here in controversy, we believe, contrary to the Administrative Law Judge, that it abandoned that claim by its 1959 contract with NYSA. Thus, section 8(a) of that agreement provides that "Any employer shall have the right to use any and all type of containers without restriction or stripping by the union." Plainly, this language is designed to ensure that there would be no restriction on the handling of any type of container, including LTL or LCL containers. The only qualifications specified, which are contained in section 8(b) and (c), provide the *quid pro quo* for this concession. Section 8(b) provides for the payment of royalties on "containers" which are loaded or unloaded by non-ILA labor away from the pier. Section 8(c) requires that ILA labor be used to perform container work actually performed for NYSA members themselves, whether at their terminals or by their subcontractors. Since Consolidated and Twin

[18] Rule 3, par. (f), of the Rules on Containers provides:

(f) If any shippers or their agents who have at any time used, are now using, or in the future use containers owned or leased by employer-members, hereafter use containers not owned or leased by employer-members, for the purpose of evading the provisions of Rule 2 hereof, then the containers so used shall be considered to be within Rule 1 and Rule 2.

[19] The record reveals the following stripping and restuffing incidents involving Consolidated and Twin: Lloyd Jacobs of Consolidated testified to three periods of stripping and restuffing of Consolidated containers. The first in 1966 or 1967, the second in 1968, and the third in 1971. Nestor Sanjurjo of Twin testified to two periods of stripping and restuffing of Twin containers. The first in 1968 and the second in 1971. As already noted, these incidents coincided with periods of contract negotiations and lasted no more than 2 or 3 weeks at a time.

are customers rather than subcontractors of NYSA members, their containers obviously do not fall within the purview of Section 8(c).

Since 1959, and until the enforcement of the Dublin Supplement in 1973 which gave rise to this proceeding, ILA has handled the containers of Consolidated and Twin in a manner consistent with the requirements of the 1959 contract as set forth above. Thus, with few exceptions, ILA has loaded such containers without stripping and restuffing.[19] We believe that this adherence to the plain meaning of the contract's provisions confirms the view we have taken of the contract.[20] The limited stripping and restuffing performed by ILA at times coinciding with contract negotiations reveals, at most, attempts on the part of ILA to bolster its bargaining position.

Finally, there is another circumstance present in this case which, according to the Supreme Court's caveat in *National Woodwork, supra,* we must take into account.[21] We recognize that the economic personality of the industry is marked by the absence of a distinction in the essential character of the work of stuffing and stripping, whether it is performed by full-load shippers or by consolidators handling LCL and LTL loads. Thus, Consolidated and Twin, as customers of the shipping companies, are no different in this respect than the full-load cus-

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[20] As recently as the 1968 contract negotiations, NYSA asserted that, by virtue of the 1959 contract, it had the contractual right to move containers without any restriction at all.

[21] The Court's main opinion cautioned that the test for determining the legality of a restrictive clause must be made with full concern for "all the surrounding circumstances." Such circumstances were defined by the Court as including "the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry." 386 U.S. at 644-645, fn. 38.

tomers to whom the shipping companies furnish containers. Although ILA does not now claim the work of stuffing and stripping shippers' loads, the logic of its position would support a claim for all container work, without regard to the identity of the competing employees. As we noted in *California Cartage Company,* "a boycott to enforce a claim to stuff shippers' loads and door-to-door deliveries would have an enormous impact on the shipping industry."[22]

On the basis of the foregoing, and the entire record, we reject the Respondents' assertion that ILA's boycott and its contractual agreements with NYSA had a lawful primary object. We find that by maintaining, giving effect to, and enforcing the contracts and agreements known as the Rules on Containers, as set forth in the Union's memorandum of understanding, executed on or about February 14, 1971, and the provisions known as the Dublin Supplement, executed on or about January 29, 1973, Respondent NYSA and Respondent ILA violated Section 8(e) of the Act. We also find that by threatening to assess and by assessing liquidated damages as provided in the above-described agreements, thereby threatening, restraining, and coercing Respondent NYSA, Sea-Land, Seatrain, and TTT with an object being to force those persons engaged in commerce to cease doing business with Consolidated and Twin, Respondent ILA violated Section 8(b)(4)(ii)(B) of the Act.

The Remedy

Having found Respondent ILA and Respondent NYSA to have engaged in unfair labor practices in violation of

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[22] *International Longshoremen's and Warehousemen's Union; Locals 13 and 63, ILA (California Cartage Company, Inc.),* 208 NLRB 994, 996 (1974).

Section 8(e), and Respondent ILA to have engaged in unfair labor practices in violation of Section 8(b)(4)(ii)(B) of the Act, we shall order that each Respondent cease and desist from the proscribed conduct and take certain affirmative action which we find necessary to remedy and remove the effects of the unfair labor practices and to effectuate the policies of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Union, International Longshoremen's Association, AFL-CIO, New York, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Maintaining, giving effect to, and enforcing the contracts and agreements known as the Rules on Containers and the Dublin Supplement between ILA and NYSA to the extent and in the manner said contracts and agreements have been found to be unlawful herein, or any other contract or agreement, express or implied, whereby NYSA, on behalf of its employer-members, agrees to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act.

(b) Threatening, coercing, or restraining NYSA or any of its employer-members, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require such persons to cease

doing business with Consolidated Express, Inc., or Twin Express, Inc.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) Notify its members who are employed by employer-members of NYSA, that Respondent Union has no objections to loading or unloading containers that have been stuffed, or are to be unstuffed, by employees of Consolidated Express, Inc., or Twin Express, Inc.

(b) Notify all its members who are employed by employer-members of NYSA, that any previous instructions, requests, or appeals made by Respondent Union to strip and restuff containers stuffed, or to be unstuffed, by Consolidated Express, Inc., or Twin Express, Inc., have been withdrawn and are to have no force or effect.

(c) Notify all its members that any and all of the paragraphs contained in the contracts and agreements known as the Rules on Containers and the Dublin Supplement negotiated by and between ILA and the Council of North American (*sic*) Shipping Associations on behalf of NYSA which limit, restrain, restrict, tax, or prohibit handling, in the customary manner, containers that have been stuffed or are to be unstuffed by Consolidated Express, Inc., or Twin Express, Inc., have been found to be void and unenforceable with respect to Consolidated Express, Inc., and Twin Express, Inc.

(d) Post at its business offices, meeting halls, and all dispatch halls copies of the attached notice marked "Ap-

pendix A."'[23] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by a representative of Respondent Union, shall be posted by Respondent Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including the dispatch halls and all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent Union has taken to comply herewith.

B. Respondent New York Shipping Association, Inc., New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from maintaining, giving effect to, and enforcing the contracts and agreements known as the Rules on Containers and the Dublin Supplement between ILA and NYSA to the extent and in the manner said contracts and agreements have been found to be unlawful herein, or any other contract or agreement, express or implied, whereby NYSA, on behalf of its employer-members, agrees to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act.

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[23] In the event that this Order is enforced by a Judgment of a United States Courts of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) Notify all its employer-members that any previous instructions, requests, or appeals which Respondent NYSA may have made against loading or unloading containers that have been stuffed, or are to be unstuffed, by Consolidated Express, Inc., or Twin Express, Inc., are to be withdrawn and to have no force or effect.

(b) Notify all its employer-members that any and all provisions of the contracts and agreements known as the Rules on Containers and the Dublin Supplement which have been negotiated between ILA and the Council of North American (*sic*) Shipping Associations on behalf of NYSA which restrain, restrict, limit, tax, or prohibit handling, in the customary manner, containers that have been stuffed, or are to be unstuffed, by Consolidated Express, Inc., or Twin Express, Inc., have been found to be void and unenforceable with respect to Consolidated Express, Inc., and Twin Express, Inc.

(c) Notify all its employees and employer-members that it has no objection to their loading, unloading, or otherwise handling containers that have been stuffed or are to be unstuffed by Consolidated Express, Inc., or Twin Express, Inc.

(d) Mail to each of its employer-members and post at its main office in New York, New York, and at each area office copies of the attached notice marked "Appendix B."[24] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Re-

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[24] See fn. 23, *supra.*

Decision of the National Labor Relations Board,
221 NLRB No. 144, December 4, 1975.

spondent NYSA's representative shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employer-members are customarily posted. Reasonable steps shall be taken by Respondent NYSA to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent NYSA has taken to comply herewith.

Dated, Washington, D.C., December 4, 1975.

.....
Betty Southard Murphy, Chairman

.....
John H. Fanning, Member

.....
Howard Jenkins, Jr., Member

.....
John A. Penello, Member
(SEAL) NATIONAL LABOR RELATIONS BOARD

Decision of the United States Court of Appeals for the Second Circuit, June 29, 1976.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 802, 803—September Term, 1975.

(Argued March 17, 1976 Decided June 29, 1976

DOCKET NOS. 75-4266, 76-4003

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and NEW YORK SHIPPING ASSOCIATION, INC.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

TWIN EXPRESS, INC.,
Intervenor,

and

CONSOLIDATED EXPRESS, INC.,
Intervenor,

and

TRUCK DRIVERS UNION LOCAL 807, IBT,
Intervenor.

Before:

MOORE, *Senior Circuit Judge*, FEINBERG, *Circuit Judge, and* WYZANSKI, *Senior District Judge*•

• Senior District Judge of the District of Massachusetts, sitting by designation.

THOMAS W. GLEASON, New York City (Herzl S. Eisenstadt), *for Petitioner, ILA, AFL-CIO.*

CONSTANTINE P. LAMBOS, New York City (Jacob Silverman, Donato Caruso, Lorenz, Finn, Giardino & Lambos), *for Petitioner, NYSA.*

HOWARD E. PERLSTEIN, Washington, D. C. (John S. Irving, John E. Higgins, Jr., Elliott Moore, Robert A. Giannasi, NLRB), *for Respondent.*

ALLAN I. MENDELSOHN, Wash., D. C. (Glassie, Pewett, Beebe & Shanks), *for Intervenor, Twin Express, Inc.*

MARTIN SCHNEIDERMAN, Wash., D. C. (Samuel T. Perkins, Steptoe & Johnson), *for Intervenor, Consolidated Express, Inc.*

J. WARREN MANGAN, Long Island City, N. Y., *for Intervenor, Truck Drivers Union Local 807, IBT.*

BRUCE H. SIMON, New York City (Cohen, Weiss & Simon), *for Amicus Curiae, Local 707, IBT.*

HOWARD SCHULMAN, New York City (Schulman, Abarbanel & Schlesinger), *for Amicus Curiae, Maritime Port Council of Greater New York and Vicinity.*

WYZANSKI, *Senior District Judge:*

This case is here on joint petitions for review filed by the International Longshoremen's Association, AFL-CIO (ILA) and the New York Shipping Association, Inc. (NYSA) and on a cross-application for enforcement filed

by the NLRB. All involve an order issued by the NLRB on December 4, 1975. See 221 NLRB No. 144. Twin Express, Inc. and Consolidated Express, Inc. and Truck Drivers Union Local 807, IBT intervened in this court in support of the order.

The statutory framework for this case is supplied by Section 8(e) and Section 8(b)(4)(ii)(B) of the NLR Act. 29 U.S.C. §158(e) and (b)(4)(ii)(B). Section 8(e) provides that it is an unfair labor practice for a labor organization and an employer

> "to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void . . ."

Section 8(b)(4)(ii)(B), so far as relevant, provides that it is an unfair labor practice for a union

> "to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an objective thereof is—
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any person . . . . *Provided,* That nothing contained, in this clause (B) shall be construed to make uniawful . . . any primary strike or primary picketing;"

Loosely stated, the complaint underlying this controversy arises from activities of ILA and NYSA having the object of giving to New York longshoremen represented by ILA the right when containers arrive at a New York dock to remove cargo from such containers although they have been loaded by consolidators and to reload them, before the container is laded, and also to remove cargo from containers destined for consolidators and to reload the cargo before such containers are turned over to consolidators.

There is no dispute as to the objective facts in this case. The record is unambiguous, and indeed the situation is one with which this court is not unfamiliar.[1]

In the proceedings here under review, the charging parties before the NLRB were Consolidated Express, Inc. and Twin Express, Inc. Each is a non-vessel-owning common carrier engaged in the business of containerizing

[1] Compare *Intercontinental Container Transport Corporation* v. *New York Shipping Assn.*, 426 F.2d 884 (C.A.2,1970). There the holding was that the District Court was not justified in granting a preliminary injunction upon a complaint by a container corporation (whose business was assembling ships' cargo and packing it into containers and in receiving containers, unpacking them, and forwarding the contents to the various consignees) that NYSA (the same organization of steamship carriers and associated stevedores and certain employers of longshore labor involved in the case at bar) and ILA (the same union involved in the case at bar) had violated the Sherman Act by entering an agreement in which NYSA had yielded to ILA's demand that longshoremen employed on docks and piers be the only persons permitted to perform the work of stuffing and stripping containers carried by steamship carriers belonging to NYSA. Admittedly, the rationale given by the court was that in such agreement ILA was acting in its self-interest with the object of preserving for its members work traditionally performed by them as longshoremen. However, Judge Hays' opinion at p. 887, col. 1, first full paragraph, carefully distinguishes an action (such as the instant one) which is within the exclusive jurisdiction of the NLRB and which is "based on different allegations and seeking an entirely different remedy, [where] the court must defer to the Board."

less-than-container-load (LCL) or less-than-trailer-load (LTL) cargo for shipment between Puerto Rico and its inland facility located within 50 miles of the Port of New York. Each is rightly described as a "consolidator" because at its off-pier facilities it consolidates crates of its customers into large containers or trailers provided by steamship companies.

Consolidators such as the charging parties truck their trailers to the pier-side facilities of the steamship companies which then load the containers onto their ships bound for Puerto Rico. Conversely, when ships carrying goods from Puerto Rico arrive in New York, steamship companies unload the incoming containers, including the LCL containers, which the consolidators then truck to their off-pier facilities where the consolidators open the containers and separate the crates for delivery to the ultimate consignees. In the trade, the act of filling a container with cargo is known as "stuffing," and the act of removing cargo from a container is known as "stripping" or "unstuffing."

As already indcated, the grievances charged arise from the activities and agreements of ILA and NYSA traceable to ILA's claim that employees represented by it shall have the right at the pier to stuff or to strip every container carried by a ship owned or chartered by a member of NYSA loading or unloading at the Port of New York. This claim is based upon ILA's contention that its members traditionally performed at the pier the work of stuffing and stripping, and that the activities and agreements to which the charging parties object are designed to preserve work to which ILA-represented employees working in the Port of New York were entitled.

The record before the NLRB shows that the introduction of increasingly larger containers, currently as large as 8 x 8 x 40 feet, resulted in fewer individual cargo units for the longshoremen to load onto and off the ships.

In 1958, ILA protested the use of Dravo containers, boxes which were 8 cubic feet in size, and commenced a strike against NYSA.

But in 1959, NYSA and ILA reached an agreement which provided that:

> "a. Any employer shall have the right to use any and all type of containers without restriction or stripping by the union.
>
> b. The parties shall negotiate for two weeks after the ratification of this agreement, and if no agreement is reached shall submit to arbitration . . . the question of what should be paid on containers which are loaded or unloaded away from the pier by non-ILA labor, such submission to be within 30 days thereafter.
>
> c. Any work performed in connection with the loading and discharging of containers for employer members of NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates."

Thereafter, in accordance with the agreement, the longshoremen did not, for a time, insist, as they had during the strikes, on stripping the cargo from containers and restuffing them. They allowed containers to cross the New York docks without rehandling. Yet when ILA-NYSA collective-bargaining contracts expired, and there were not yet new agreements, the ILA members insisted on stripping and restuffing containers which were delivered by or to the consolidators.

By 1967, technology had so advanced that fully containerized ships were used to carry large containers. This caused ILA to renew its demand that its longshoremen

stuff and strip all containers crossing the piers. A 57-day strike followed. In 1969, in an attempt to resolve their differences, ILA and NYSA entered into an agreement known as the "Rules of Containers," which provided as follows:

> Rule 1. Definitions and rule as to containers covered.
> Stuffing—Means the act of placing cargo into a container.
>
> Stripping—Means the act of removing cargo from a container.
>
> Loading—Means the act of placing containers aboard a vessel.
>
> Discharging—Means the act of removing containers from a vessel.
>
> These provisions relate solely to containers meeting each and all of the following criteria:
>
> (a) Containers owned or leased by employer-members (including containers on wheels) which contain LTL loads or consolidated full container loads.
>
> (b) Such containers which come from or go to any person (including but not limited to a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo.
>
> (c) Such containers which come from or go to any point within a geographical area of any port in the North Atlantic District described by a 50-mile circle with its radius extending out from the center of each port.

Rule 2. Rule of stripipng and stuffing applies to such containers.

A container which comes within each and all of the criteria set forth in Rule 1 above shall be stuffed and stripped by ILA longshore labor. Such ILA labor shall be paid and employed at longshore rates under the terms and conditions of the General Cargo Agreement. Such stuffing and stripping shall be performed on a waterfront facility, pier or dock. No container shall be stuffed or stripped by ILA longshore labor more than once. Notwithstanding the above provisions, LTL loads or Consolidated Container loads of mail, of household goods with no other type of cargo in the container, and of personnel (*sic*) effects of military personnel (*sic*) shall be exempt from the rule of stripping and stuffing.

Rule 3. Rules on No Avoidance or Evasion.

• • • • •

(e) Failure to stuff or strip a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 2 shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been stuffed or stripped under the rules, then the steamship carrier shall pay, to the joint Container Royalty Fund liquidated damages of $250 per container which should have been stuffed or stripped. Such damages shall be used for the same purposes as the first Container Royalty is used in each port. If any carrier does not pay liquidated damages within 30 days

after exhausting its right to appeal the imposition of liquidated damages to the Committee provided in (g) below, the ILA shall have the right to stop working such carrier's containers until such damages are paid.

In 1970, NYSA agreed to increase the liquidated damages imposed upon the offending carriers to $1,000 for each offense. The disputes continued, however, and in 1973, the Council of North American Shipping Associations and ILA met and entered into the Dublin Supplement which provided in pertinent part as follows:

Enforcement of Rules on Containers.

• • • • •

1. (a) All outbound (export) consolidated or LTL container loads (Rule 1 containers) shall be stripped from the container at pier by deepsea ILA labor and cargo shall be stuffed into a different container for loading aboard ship.

1. (b) All inbound (import) consolidated or LTL cargo (Rule 1 containers) for distribution shall be stripped from the container and the cargo placed on the pier where it will be delivered and picked up by each consignee.

2. No carrier or direct employer shall supply its containers to any facilities operated in violation of the Rules on Containers including but not limited to a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder who is either a consolidator or a distributor. No carrier or direct employer shall operate a facility in violation of the Rules on Containers which specifically require that all con-

tainers be stuffed or stripped at a waterfront facility (pier or dock) where vessels normally dock.
A list shall be maintained of consolidation and distribution stations which are operated in violation of the Rules for the information of all carriers and direct employers. Any container consolidated at or distributed from such facilities shall be deemed a violation and subject to the rules on stuffing and stripping.

After the Dublin Supplement, Sea-Land Service, Inc., Seatrain Lines, Inc., and Transamerican Trailer Transport, Inc., each being a member of NYSA who operates specially designed container ships between New York and Puerto Rico, confronted the choice of paying wages to ILA labor for stripping and restuffing containers sent by Consolidated and Twin, or paying damages assessed by ILA. On some occasions the three companies elected not to pay such wages to ILA. Thereafter the ILA assessed against each company damages amounting in total in the case of the first two companies of over $100,000 each, and in the case of TTT of a smaller sum. Then each company stopped supplying its empty containers to the consolidators. We need not pursue the details; it is uncontested that on April 13, 1973 NYSA and ILA issued to all NYSA members a joint notice announcing that steamship lines had been assessed damages for violating the rules with respect to containers stuffed or stripped at the premises of Consolidated or Twin, or other consolidators.

June 1, 1973 Consolidated filed with the NLRB two sets of unfair labor practice charges. The first alleged that ILA had violated the secondary boycott provisions of the Act, Section 8(b)(4)(ii)(B). The second alleged that, by maintaining and enforcing the supplemental Rules on Containers, NYSA had violated the hot cargo provisions of the

Act, Section 8(e). August 23, 1973 the NLRB issued a consolidated complaint based on those two sets of charges.

November 2, 1973 Twin Express, Inc. filed parallel charges, which led the NLRB on January 3, 1974 to issue a parallel complaint. The NLRB consolidated the two cases. The NLRB permitted Truck Drivers Union Local 807, IBT to intervene.

The Administrative Law Judge rejected the complaints; but the NLRB reversed and sustained them. It found that ILA and NYSA, by enforcing the Rules on Containers as supplemented, had violated Section 8(e) of the Act, and that, by assessing liquidated damages against Sea-Land, Seatrain, and TTT, had violated Section 8(b)(4)(ii)(B) of the Act. By its December 4, 1975 order, here under review, the NLRB required ILA and NYSA to cease enforcing the Rules on Containers as supplemented to the extent that they had been found unlawful, or any like agreement. The order also required ILA to cease restraining NYSA or any of its members or others in interstate commerce where the object is to require any of them to cease doing business with Consolidated or Twin. Furthermore, the order provided for familiar types of notice.

The opinion of the NLRB seems to us to state the essence of the matter clearly, succinctly, and correctly. The following parts of the opinion seem to us controlling and convincing:

> [. . . T]he disposition of this case turns on whether ILA's activities and its contractual agreements with NYSA had primary or secondary objectives. If ILA's activities and its agreements with NYSA were designed to preserve work to which ILA-represented employees working in the Port of New York were entitled, then both the activities and the contractual arrangements would be primary in purpose and, therefore, would not

be unlawful. However, if ILA's real object was to obtain either work traditionally performed by employees not represented by ILA or work to which ILA had abandoned all claims, then the pressures on NYSA members and the contractual arrangements would have a secondary object and would violate Section 8(b)(4)(ii)(B) and 8(e), respectively. As the United States Supreme Court instructed in *National Woodwork Manufacturers Association* v. *N.L.R.B.*, "[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees."[15]

[15] 386 U.S. 612, 644-645 (1967). See also *International Longshoremen's Association, Local 1218, AFL-CIO (U.S. Naval Supply Center)*, 195 NLRB 273 (1972).

[. . . I]n order to properly evaluate the validity of ILA's claim to the work, "it is essential to define with some precision the work in controversy since that is the predicate upon which the issue of work preservation must turn." It is clear from the record that the work in controversy here is the LCL and LTL container work performed by Consolidated and Twin at their own off-pier premises. It is with this precise work in mind that the contentions of the parties must be evaluated.

The traditional work of the longshoremen represented by ILA has been to load and unload ships. When necessary to perform their loading and unloading work, longshoremen have been required to stuff and strip containers on the piers. [Footnote omitted.]

Similarly, for many years, maritime cargo has been sorted and consolidated off the docks by companies employing teamsters and unrepresented employees. With the advent of vessels designed exclusively to

carry the large containers presently in use, these consolidating companies, such as Consolidated and Twin, have continued to consolidate shipments into containers prior to their placement aboard the vessels. The consolidators generate such work themselves, performing it not on behalf of the employer-members of NYSA but for their own customers who have goods to ship. Furthermore, they perform this consolidation work at their own off-pier premises, with their own employees who are outside the unit represented by ILA, and who fall within the coverage of separate collective bargaining agreements, under which they are represented by other labor organizations. It is clear, therefore, that Consolidated and Twin have traditionally been engaged in the work of stuffing and stripping containers such as are here in controversy.

From the foregoing and the record as a whole, it is clear that the on-pier stripping and stuffing work performed by longshoremen as an incident of loading and unloading ships does not embrace the work traditionally performed by Consolidated and Twin at their own off-pier premises. It does not fall within ILA's traditional role to engage in make-work measures by insisting upon stripping and stuffing cargo merely because that cargo was originally containerized by nonunit personnel. Yet, ILA's demand here could only be met if the work traditionally performed off the pier by employees outside the longshoremen unit were taken over and performed at the pier by longshoremen represented by ILA.

What we have quoted is supported by substantial evidence and by sound analysis and is sufficient to sustain the Board's December 4, 1975 order in full, and to justify its enforcement as prayed.

We are not similarly impressed with the NLRB's other reasons for its order, such as the alleged abandonment by ILA of its claims. However, such points are moot in view of the ground we have given for enforcement of the order.

December 4, 1975 Order of the NLRB enforced as prayed by the NLRB's cross-applications and petitions of ILA and NYSA denied.

International Longshoremen's Ass'n

v.

NLRB

FEINBERG, Circuit Judge (dissenting):

I dissent.

The decision of the Board in this case that petitioners ILA and NYSA violated section 8(e) of the National Labor Relations Act and that ILA also violated section 8(b)(4)(ii)(B) rests upon a fundamental error. The Board recognized in its opinion that a labor contract that seeks to preserve work traditionally done in the bargaining unit does not violate section 8(e). *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612 (1967). Whether work preservation is actually the objective of a contract provision is frequently difficult to resolve, see, e.g., *NLRB* v. *National Maritime Union of America*, 486 F.2d 907 (2d Cir. 1973), cert. denied, 416 U.S. 970 (1974), and whether union pressure has an improper object is usually a question of fact. *Bedding, Curtain and Drapery Workers Union* v. *NLRB*, 390 F.2d 495, 499 (2d Cir.), *cert. denied*, 392 U.S. 905 (1968). Ordinarily, therefore, the Board's determination of such an issue is entitled to great weight. But in this case, the Board's decision that work preservation was not the union objective rests upon a basic error

of law, which is highlighted in the portion of the Board opinion quoted by my brothers.

"[I]t is essential," according to the Board, "to define with some precision the work in controversy" since that is basic to the issue of work preservation. The Board then defines the "work in controversy" as

> the LCL and LTL container work performed by Consolidated and Twin at their own off-pier premises.[1]

This definition is incorrect because it focuses on the work done in the past by the intervening complaining parties, Twin Express, Inc. and Consolidated Express, Inc., rather than on the work done in the past by the longshoremen represented by ILA. The Administrative Law Judge in this case, former Board General Counsel Arnold Ordman, did not fall into this error. In his thorough opinion dismissing the complaint aganst ILA and NYSA, he stated:

> Work preservation agreements usually come into being because the work sought to be protected has been subjected to invasion or threat of invasion by others. Thus, in *National Woodwork* itself, the carpenters employed by the employer refused to install precut doors unless the doors were cut on the jobsite by the carpenters themselves. The carpenters had traditionally performed that work themselves. Yet, obviously the employees of the door manufacturers who comprised the National Work Manufacturers Association did that work also. Had the Supreme Court focused on the work being done by the employees of the door manufacturers at the latter's plants, as General Counsel urge be done here with respect to the operations of Consolidated and Twin,

[1] International Longshoremen's Ass'n, 221 N.L.R.B. No. 144, at 11.

> then obviously the Supreme Court would have reached a different result in *National Woodwork*. Indeed, the legitimacy of a work preservation objective would be virtually precluded in any situation where it could be established that other employees at other sites were doing or had done the work for which protection was being sought.[2]

The question before the Board was: What work was it that ILA and NYSA were allegedly attempting to preserve? If the Board was free to define the work in question as the off-pier consolidation into containers of LCL/LTL cargo, the case is indeed an easy one and the Board's decision is correct. But if the work is defined as the work the ILA members used to do on the pier before containerization moved most of it off the pier, the case takes on a different cast. As the Administrative Law Judge noted, just as it would have been improper in *National Woodwork* to define the work in controversy as work on the pre-cut doors, it is wrong here to define the work in controversy as off-pier container stuffing. The Administrative Law Judge found that

> virtually all solid cargo moving over the docks in the Port of New York had for decades been handled on a piece-by-piece basis by longshoremen and employees in related crafts who worked on the docks and were represented by ILA. Typically, that work included the preparation of cargo for shipment by the making up and loading of cargo on drafts, pallets and boxes for export, and the breaking down of such cargo from incoming ships for delivery to the consignees.[3]

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[2] Id., Decision of Administrative Law Judge, at 25.

[3] Id. at 11.

The technology of containerization, by making possible the consolidation of cargo off the piers into large containers which can be loaded onto specially-designed ships by fewer workers than were required by piece-by-piece loading, has "reduced substantially the need for longshore and other labor."[4]

Understandably, ILA resisted the new technology. For at least two decades, there has been a struggle over technological improvement in which longshoremen have attempted to keep jobs on the pier that are threatened by modernization. *National Woodwork* teaches that conflicts between workers and employers over this problem are to be resolved by collective bargaining, and that the resulting pressure by unions and collective bargaining agreements do not violate sections 8(b)(4)(ii)(B) and 8(e).

Some would no doubt disagree with our present national labor policy, expressed in *National Woodwork*, that problems caused by automation of the workplace are best resolved through collective bargaining. But for the present that is our policy, and it permits work preservation agreements even if they cause economic hardship to third parties. The Board cannot be permitted to frustrate this policy in the guise of making factual findings. Yet that is the result of enforcing the Board's order in this case. The carefully constructed collective bargaining agreements and rules which were the result of hard bargaining and contending economic pressures, see International Container Transport Corp. v. New York Shipping Ass'n, 426 F.2d 884, 888 (2d Cir. 1970), are now set aside. Whether that will result in chaos and economic hardship in the Port of

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[4] Id.

Decision of the United States Court of Appeals for the Second Circuit, June 29, 1976.

New York, as some of the parties predict,[5] is not for us to resolve. But it is our province to decide whether the result is legally sound. I believe it is not, because the Board committed an error of law by focusing on the wrong "work" in deciding whether ILA and NYSA were protected by the *National Woodwork* work preservation doctrine. Therefore, I would not enforce the Board's order.

[5] Brief of Petitioner NYSA, at 50; Brief of Petitioner ILA, at 43-47; Brief Amicus Curiae of Maritime Port Council of Greater New York and Vicinity, at 2-4. On the other hand, the consolidators argue that the contract provisions invalidated by the Board would put them out of business. Brief of Intervenor Consolidated Express, Inc., at 24-25; Brief of Respondent-Intervenor Twin Express, Inc., at 26-28.

Order Denying Rehearing, August 6, 1976.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of August, one thousand nine hundred and seventy-six.

Present: HON. WILFRED FEINBERG,
HON. LEONARD P. MOORE,
Circuit Judges,

HON. CHARLES E. WYZANSKI,
District Judge.

Docket No. 75-4266

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and NEW YORK SHIPPING ASSOCIATION, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

A petition for a rehearing having been filed herein by counsel for the Petitioners,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk
by EDWARD J. GURDANO
Senior Deputy Clerk

Order Denying Rehearing *en banc*, August 6, 1976.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of August, one thousand nine hundred and seventy-six.

Docket No. 75-4266

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and NEW YORK SHIPPING ASSOCIATION, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the petitioners, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Chief Judge

Judgment, September 9, 1976.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 75-4266 & 76-4003

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and NEW YORK SHIPPING ASSOCIATION, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

TWIN EXPRESS, INC.,

Intervenor,

and

CONSOLIDATED EXPRESS, INC.,

Intervenor,

and

TRUCK DRIVERS UNION LOCAL 807, IBT,

Intervenor.

JUDGMENT

Before: MOORE, Senior Circuit Judge, FEINBERG, Circuit Judge, and WYZANSKI, Senior District Judge*

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* Senior District Judge of the District of Massachusetts, sitting by designation.

Judgment, September 9, 1976.

THIS CAUSE came on to be heard upon a petition filed by International Longshoremen's Association, AFL-CIO and New York Shipping Association, Inc., to review an order of the National Labor Relations Board issued against said Petitioner Union, its officers, agents, and representatives, and said Petitioner Employer, its officers, agents, successors, and assigns, on December 4, 1975, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on March 17, 1976, and has considered the briefs and transcript of record filed in this cause. On June 29, 1976, the Court being fully advised in the premises, handed down its decision denying the petition for review and granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Second Circuit that the petition for review filed by Petitioner Union and Petitioner Employer, be and it is hereby denied; and that the said order of the National Labor Relations Board in said proceeding be enforced, and that International Longshoremen's Association, AFL-CIO, New York, New York, its officers, agents, and representatives, and New York Shipping Association, Inc., New York, New York, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that costs shall be taxed against Petitioners.

LEONARD P. MOORE per G. RIDER
Judge, United States Court of
Appeals for the Second Circuit

Judgment, September 9, 1976.

CHARLES E. WYZANSKI, JR.
Senior Judge U.S.D.J. Mass.
assigned to sit as
Judge, United States Court of
Appeals for the Second Circuit
Sep. 7 1976.

FILED:
Sept. 9, 1976

Decision of the United States Court of Appeals for the Second Circuit, July 1, 1976.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SEPTEMBER TERM, 1975

Nos. 1004, 1014, 1044, 1111

Argued May 20, 1976 Decided July 1, 1976

Docket No. 76-4042

PITTSTON STEVEDORING CORPORATION and
THE HOME INSURANCE COMPANY,
Petitioners,

v.

ANTHONY DELLAVENTURA,
Respondent,

and

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, U.S.D.L.,
Party in Interest.

Docket No. 76-4009

NORTHEAST MARINE TERMINAL COMPANY, INC., Employer

and

STATE INSURANCE FUND, Carrier,
Petitioners,

v.

RALPH CAPUTO, Claimant

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

Docket No. 76-4043

PITTSTON STEVEDORING CORPORATION,
Petitioner,

v.

JOHN SCAFFIDI,
Respondent.

Docket No. 75-4249

CARMELO BLUNDO,
Claimant-Respondent,

v.

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,
Self-Insured Employer—Petitioner,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Before LUMBARD, FRIENDLY and OAKES, Circuit Judges.

Petition to review four orders of the Benefits Review Board granting awards under the Longshoremen's and Harbor Workers' Compensation Act. One petition is dismissed as untimely and a second as having been mooted by payment of the award by the insurance carrier; the other two awards are affirmed.

Joseph F. Manes, Esq., Croton-on-Hudson, N.Y., for Pittston Stevedoring Corporation and The Home Insurance Company.

William M. Kimball, Esq., New York, N.Y. (Burlingham Underwood & Lord, Esqs., of Counsel), for Northeast Marine Terminal Company and State Insurance Fund.

Leonard J. Linden, Esq., New York, N.Y. (Linden & Gallagher, Esqs., of Counsel), for International Terminal Operating Company, Inc.

Angelo C. Gucciardo, Esq., New York, N.Y. (Israel, Adler, Ronca & Gucciardo, Esqs., of Counsel), for Respondents Dellaventura, Caputo, Scaffidi and Blundo.

Ronald E. Meisburg, Esq., U.S. Department of Labor, Washington, D.C. (William J. Kilberg, Solicitor of Labor; Laurie M. Streeter, Associate Solicitor; Jean S. Cooper, Esq., and Francine K. Weiss, Esq., Department of Labor, of Counsel), for Director, Office of Workers' Compensation Programs.

Thomas W. Gleason, Jr., New York, N.Y. (Irwin Herschlag, Esq., New York, N.Y., of Counsel), for International Longshoremen's Association, AFL-CIO, *amicus curiae*.

Thomas D. Wilcox, Esq., Washington, D.C., for National Association of Stevedores, *amicus curiae*.

FRIENDLY, Circuit Judge:

We have here four petitions under 33 U.S.C. § 921(c), by employers, in some instances joined by their insurance carriers, to review orders of the Benefits Review Board (BRB) affirming compensation awards made to four employees under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended in 1972, 33 U.S.C. §§ 901 et seq.[1] They present a question of con-

[1] The Benefits Review Board was created by the 1972 Amendments to the LHWCA as an independent, "quasi-judicial" body within the

siderable importance, namely, how far the 1972 Amendments extended the coverage of LHWCA.

Presented with the same general issue, a divided panel of the Fourth Circuit ruled in favor of the employers, *I.T.O. Corporation of Baltimore* v. *Benefits Review Board, U.S. Dep't of Labor and Adkins*, 529 F.2d 1080 (1975), holding that the Act extended benefits only to persons injured while unloading cargo from the ship to what the majority termed a "first point of rest," i.e., the first place where the cargo is deposited on a pier or terminal area after being unloaded, and to persons injured while loading cargo from the "last point of rest," 529 F.2d at 1081. The *I.T.O.* case has been reheard *en banc*. We are told that only one other circuit has construed the extended coverage provisions here at issue, *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957 (9 Cir. 1975), rehearing denied, Feb. 6, 1976, petition for cert. filed, No. 75-1620, 44 U.S.L.W. 3645 (U.S. May 6, 1976), a case we do not consider to be truly relevant, but that the issue here presented is *sub judice* in the First Circuit, *John T. Clark & Son of Boston, Inc.* v. *William Stockman*, No. 75-1360, argued Jan. 5, 1976, and in the Fifth Circuit. Given the importance of the question, the number of courts of appeals endeavoring to find an

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Department of Labor. 33 U.S.C. § 921(b)(1); 20 C.F.R. § 801.103 (1975). Its three members are appointed by the Secretary of Labor, and it is "authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter," made by the administrative law judges who hear LHWCA claims in the first instance. 33 U.S.C. §§ 919(d), 921(b)(1) and (3) (as amended). Prior to the 1972 amendments, there was no administrative review procedure for LHWCA claims; cases were heard in the first instance by Deputy Commissioners and review was then had in the United States district courts. 33 U.S.C. § 921 (1970). Under the 1972 amendments cases are heard by an administrative law judge whose decisions are reviewed by the BRB, and appeals lie to the court of appeals directly from final orders of the BRB. 33 U.S.C. § 921(c).

answer, and the divergence of opinion already manifested, it seems unlikely that the opinion of any court of appeals will be the last word to be said. In consequence we shall not dwell on the long history of the problem of affording appropriate remedies for longshoremen and harbor workers against their employers which had its inception in *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917)—a history which is interestingly traced in Gilmore & Black, The Law of Admiralty §§ 6-45 to -49 (2d ed. 1975)—but will proceed directly to the cases in hand.

I. The 1972 Amendments

The situation that led to adoption of the 1972 Amendments was described as follows in the portion of the Senate Report headed "Need for the Bill," S. Rep. No. 92-1125, 92d Cong., 2d Sess. 4-5 (1972):

> Since 1946, due to a number of decisions by the U.S. Supreme Court, it has been possible for an injured longshoreman to avail himself of the benefits of the Longshoremen's and Harbor Workers' Compensation Act and to sue the owner of the ship on which he was working for damages as a result of his injury. The Supreme Court has ruled that such ship owner, under the doctrine of seaworthiness, was liable for damages caused by any injury regardless of fault. In addition, shipping companies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedore on theories of express or implied warranty, thereby transferring their liability to the stevedore company, the actual employer of the longshoremen.
>
> The social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers.

> For a number of years representatives of the employees have attempted to have the benefit levels under the Act raised so that injured workers would be properly protected by the Act. At the same time, employer groups indicated their willingness to increase such payments but indicated they could do so only if the Longshoremen's and Harbor Workers' Compensation Act were to again become the exclusive remedy against the stevedore as had been intended since its passage in 1927 until modified by various Supreme Court decisions.
>
> The bill reported by the committee meets these objections by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and "hold harmless" or indemnity agreements. It continues to allow suits against vessels or other third parties for negligence. At the same time it raises benefits to a level commensurate with present day salaries and with the needs of injured workers whose only support will be payments under the Act.

In practical terms the bill was a trade-off. See *Landon* v. *Lief Hoegh and Co., Inc.*, 521 F.2d 756, 761-62 (2 Cir. 1975), cert. denied, 96 S.Ct. 783 (1976). Stevedores and other employers were pushing for complete abolition of the three-way damage action possible under *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U.S. 85 (1946), which held longshoremen and other harbor workers to be "seamen" entitled to sue the ship for unseaworthiness, and *Ryan Stevedoring Co., Inc.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), which permitted the shipowner to seek indemnity for any liability thus entailed from an injured worker's employer. This triangle in effect exposed the employer (already liable for and often having paid the limited benefits provided by the LHWCA) to an unlimited liability to the employee for damages and to the shipowner for its counsel fees in defending the employee's

suit. The unions representing longshoremen and other harbor workers, which for years had been seeking increased benefits under the Act, opposed Congressional repeal of their *Sieracki*-created status as "seamen" in part on the grounds that the LHWCA's benefits were so low that workers needed the additional protection of the "unseaworthiness" doctrine. The compromise between these positions effected by the 1972 Amendments was this: The *Sieracki* action for unseaworthiness was eliminated, longshoremen in the future could sue the ship only for negligence, and employers were immunized from indemnity suits by shipowners. 33 U.S.C. § 905(b). In return, the workers were to secure increased benefits under LHWCA and, what is here pertinent, an extension of that statute's coverage. Thus the Senate Committee said that the principal purpose of the Amendments was "to upgrade the benefits, extend coverage to protect additional workers, provide a specified cause of action for damages against third parties, and to promulgate administrative reforms," Sen. Rep., *supra*, p. 1.

The change in the coverage section was dramatic. Before amendment the first sentence of 31 U.S.C. § 903 (a) read:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

The Amendments altered this to read:

> Compensation shall be payable under this chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the

> United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

In place of the definition of "employee" previously contained in § 902(3) as "not includ[ing] a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net," the Amendments defined the term as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

The definition of "employer," § 904(4)

> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

was modified by inserting after "navigable waters of the United States" the expansion of that term by the parenthetical phrase in § 903.[2]

Thus, under the Amendments there are two tests for coverage under the Act: a "situs" test requiring the injury to occur on the "navigable waters" as now defined, and a "status" test which requires that the employee be

[2] The significance of this definition is that liability for compensation is predicated on being an "employer," 33 U.S.C. § 904.

"engaged in maritime employment," etc. While the situs test has been liberalized, the creation of an employee status test adds a new element to the coverage requirements.[3] The problem with which we are here concerned arises from Congress' failure to supply any definition of two terms in § 902(3)—"engaged in maritime employment" and "any longshoreman or other person engaged in longshoring operations."

II. The Facts

Two of the cases before us, relating to claimants Blundo and Scaffidi, concern the loading or unloading of containers; the other two, relating to claimants Dellaventura and Caputo, involve loading of ordinary cargo into consignees' trucks on the pier.

(1) *Blundo.* Claimant Blundo was employed as a "checker" by the International Terminal Operating Co. (ITO).[4] He was injured while checking cargo being removed from a container at the 19th Street pier in Brooklyn when he walked around a draft containing cargo to mark it, slipped on some ice and fell. He was working on the stringpiece within 30 to 40 feet of the water. The container he was checking had been unloaded a few days before at a different pier and then taken by a truckman over city streets to the 19th Street pier where it was opened by the United States Customs Office and then stripped. The Administrative Law Judge (ALJ) found that the 19th Street pier was not utilized by the employer for the actual loading or unloading of vessels but rather for the storage of commodities and for the "stripping,

[3] Formerly, if an employee was not expressly excluded, as, e.g., a crew member; his injury occurring upon the navigable waters was compensable under the Act so long as his employer had "any . . . employees . . . employed in maritime employment, in whole or in part . . . ." 33 U.S.C. § 902(4) (1970).

[4] A "checker" checks the contents of a container carrying goods for several consignees against the bills of lading or other records.

or stuffing, *i.e.*, loading or unloading of containers." The BRB affirmed his findings as to the employee's status and the situs of the accident and upheld a compensation award under the LHWCA.

(2) *Scaffidi.* Claimant Scaffidi was employed by Pittston Stevedoring Corp. as a "hustler" operator, a kind of trucker who moves containers within a terminal. On March 12, 1973, Scaffidi drove a hustler loaded with containers of cargo from the Columbia Street Pier in Brooklyn, New York, through some ten blocks of public streets to Pier 12. On arriving at Pier 12 he backed the container to a receiving platform on the dock in preparation for loading the container on to the ship. When the container was opened, a large case fell out and injured him. The BRB affirmed the findings of the ALJ on the ground that the operator of a hustler used to transport containers within a terminal is enaged in an essential step in the overall process of loading cargo aboard a vessel, which was maritime employment as contemplated in 33 U.S.C. § 902(3). It found that the fact that the container had been transported over public streets was irrelevant.

(3) *Dellaventura.* Claimant Dellaventura, employed by Pittston Stevedoring Corporation as a "sorter," was injured on June 27, 1973 at Pier 20 of the Pouch Terminal on Staten Island while helping to load a truck, belonging to a consignee, with coffee bags which had been offloaded from the ship *"CAMPECHE"* on or about February 16, 1973. Dellaventura sliped on some loose coffee beans while inside the truck. At times Dellaventura's responsibilities included going into the holds of ships to assist in sorting and loading or off-loading cargo. The accident occurred about 30 feet from the water's edge on the pier. The record affords no explanation for the consignee's 133-day delay in picking up the bags of coffee beans, but the ALJ found that the pier contained no warehouse facilities. The BRB affirmed his decision on

the grounds set forth in *Avvento* v. *Hellenic Lines*, BRB No. 74-153, 1 BRBS 174, 1975 A.M.C. 153 (Nov. 12, 1974), which held that " 'until cargo is delivered to a trucker or other carrier who is to pick it up for further trans-shipment, such cargo is in maritime commerce and all employees engaged in its movement to that point are engaged in maritime employment.' "

(4) *Caputo.* Claimant Caputo was usually employed as "terminal labor" by Pittston Stevedoring Corp. When there was no work available at Pittston, he would take a "shape up" job as a longshoreman wherever it was available and on the day of the accident was working for Northeast Marine Terminal Co., Inc. at their terminal adjoining the water in Brooklyn. He was injured while helping a cargo consignee's truckdriver load boxes of cheese, discharged from a vessel at least five days previously, inside the consignee's truck; the injury occurred while he was rolling a dolly loaded with the cheese on it into the truck. Caputo and the employer stipulated that the work he was doing when injured involved the same risk as would obtain wherever and by whomsoever trucks were loaded or unloaded with dollies. But the ALJ found the stipulation lacked significance "in view of the situs where the injury actually occurred." The ALJ made an award in his favor and the BRB concurred.

III. Motion to Dismiss Petitions in Dellaventura's Case as Untimely.

Dellaventura and the Director, Office of Workers' Compensation Programs, U.S. Dept of Labor, (OWCP) by his attorney, the Solicitor of Labor, have moved to dismiss the petitions of the employer, Pittston Stevedoring Corp., and its insurance carrier, The Home Insurance Co., as untimely. We grant Dellaventura's motion, there-

by rendering it unnecessary to decide whether the Solicitor of Labor was entitled to make one.[5]

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[5] In the cases of Blundo and Caputo, petitioners named as a respondent the Director, Office of Workers' Compensation Programs in the Department of Labor; the petitions in Dellaventura's and Scaffidi's cases did not. The Director moved to amend the captions in the Dellaventura case, apparently for the primary purpose of enabling him to make the motion to dismiss; he made no similar motion to amend the caption in Scaffidi's case.

The issue whether the BRB should be a respondent in court of appeals review of its awards under 33 U.S.C. § 921(c) was treated in *McCord* v. *Benefits Review Board*, 514 F.2d 198 (D.C. Cir. 1975). There the BRB moved to dismiss the petition as to it. Petitioner did not oppose the motion and the court granted it, citing recent unreported decisions of the Ninth Circuit. The court reasoned that there was "sufficient adversity" between the claimant and the employer (or its insurance carrier) "to insure proper litigation without participation by the Board," that requiring the Board to participate "would parallel requiring the District Court to appear and defend its decision upon direct appeal" and that the presence of the second comma in 33 U.S.C. § 921(c) which reads:

> A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28.

indicated an intention that the Board should not be a party to the appeal. There were pending motions to substitute the Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor (OWCP), as a respondent which were not before the court of appeals. In the *I.T.O.* case, *supra*, the Board moved to be dismissed as a respondent and to have the Director substituted; the court granted the first branch of the motion but denied the second, 529 F.2d at 1088-89.

With respect, we cannot subscribe to the view that Congress intended to create what to us would seem a novel form of review of federal administrative action in which no one representing the Government would be a party. See F.R.App.P. 15(a) ("In each case the agency should be named respondent."). Prior to the 1972 Amendments judicial review took the form of a suit for an injunction in the district court against the deputy commissioner who made the order (former § 921(b)); in the absence of evidence of Congressional intent we find it hard to believe that, by providing internal review followed by an appeal to a court of appeals, Congress meant to oust the Government from further participation as of

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right. Appearance as an *amicus* may not be good enough, since it normally does not allow oral argument and never allows an appeal.

Neither the *McCord* nor the *I.T.O.* court discussed § 921a which provides:

> Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

The existence of sufficient adversity between private parties has not been thought to preclude the Government's right to be a party in many other sorts of review of federal administrative action. The second comma, especially in a sentence with an inappropriate first one, seems a slender reed; the "other parties" phrase, means the other parties to the BRB review but does not rule out the BRB's being a party to review in the court of appeals. While Congress did not spell matters out with the same specificity as in 28 U.S.C. § 2348, we think it sufficiently indicated its intention that the BRB and other parties to the proceeding before the BRB should be parties to a review by a court of appeals under 33 U.S.C. § 921(c); if the BRB chooses to leave the defense of its order in a particular case to the prevailing private party, it is free to do so.

The administrative regulations do not specify which branch of the agency should be represented as respondent on appeal. 20 C.F.R. § 801.402 seems to contemplate that the BRB is the proper agency respondent in court of appeals review, since it provides that "except in proceedings in the Supreme Court" the representation of the BRB is provided by the Solicitor of Labor. Moreover, § 921a quoted above seems to contemplate that the BRB be represented in court of appeals review. However, 20 C.F.R. § 801.2(a)(10) defines "party" and "party in interest" to include the "Secretary or his designee . . . ." This would indicate that the Secretary of Labor shall determine what officer represents the agency in the court of appeals. The Government's position has been that the Director, OWCP is the proper respondent. The OWCP is an administrative, not a statutory, creation. See 20 C.F.R. §§ 1.1 et seq., and § 701.203. And the Solicitor of Labor is authorized to appear and participate on behalf of the Director, OWCP as an interested party before the BRB. 20 C.F.R. § 702.333(b). However, in the section assigning to the OWCP the responsibility for administering various programs, including the LHWCA, the OWCP is given administrative authority "except [for] 921 as it applies to the Benefits Review Board . . . ." 20 C.F.R. § 1.2(d).

Trying to make sense out of these regulations, we think that while the Director, OWCP is a proper party before the ALJ or the

The statute, 33 U.S.C. § 921(c), provides that a person adversely affected or aggrieved by a final order of the BRB may obtain review by the court of appeals for the circuit where the injury occurred "by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside." The BRB's order was issued on October 9, 1975, but the petition for review was not filed until February 5, 1976.

Petitioners' basis for resisting the motion is as follows: The BRB's Rules and Regulations, 20 C.F.R. § 802.403 (b), provide that the original of any BRB decision shall be filed with the Clerk of the Board, which was done here, and that "[a] copy of the Board's decision shall be sent by certified mail or served personally on all parties to the appeal and the Director." The rule does not say when this should be done. Apparently no such notice was sent to the employer or the insurance carrier but the attorney who represented both parties before the BRB and in this court acknowledges that he received a copy within the 60-day period and does not deny that he advised his clients.

Like 28 U.S.C. § 2344 and similar provisions in the statutes for the review of orders of other agencies, 33 U.S.C. § 921(c) makes the time for seeking review start to run from the entry of the agency's order, even though the agency is under a duty to give notice. See *Willow Crossing Dairy Farm* v. *Hardin*, 327 F. Supp. 798 (W.D. Pa. 1970) (where review section of Agricultural Adjustment Act provided for filing of review petition within

BRB, see cases discussed in 3 *Larson, Workmen's Compensation Laws* § 83.19, at n. 49.1 (1976 ed.), the BRB is the proper agency respondent for review in the court of appeals, although the Solicitor of Labor could be designated to represent it. We deem it best to defer resolution of this question to a case where decision on this point is essential; perhaps in the meanwhile the Department will tidy up its regulations.

20 days of "entry" of judgment, word "entry" is to be interpreted normally and petition filed September 28 to review order of September 2 was not timely and did not vest the court with jurisdiction even though counsel for plaintiff did not receive notice of ruling until September 8). The BRB's regulations count the 60-day period from the date on which the decision is "filed," 20 C.F.R. § 802.410.[e] In the parallel situation of review of judgments of district courts in civil cases Rule 4(a) of the Federal Rules of Appellate Procedure likewise makes the entry of judgment the critical date; F.R.Civ.P. 77(d) directs the clerk to serve notice of the entry of a judgment or order but expressly provides that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure," namely, "upon a showing of excusable neglect."

We see no reason not to read 33 U.S.C. § 921(c) as meaning what it says. Cf. *United States* v. *Michel*, 282 U.S. 656 (1931); *American Construction Co.* v. *United States*, 107 F. Supp. 858 (Ct. Cl. 1952), *cert. denied*, 345 U.S. 922 (1953). The policy requiring that appeals be timely taken is so strong that ministerial failures by a

[e] In the only case construing the statutory provisions for mail notice to the parties of the Deputy Commissioner's decision under the old act, 33 U.S.C. § 919, the Deputy Commissioner's first order was apparently neither filed in his office nor mailed to the parties. The court held, in response to the employer's argument that a second, more generous award was barred by the first award, that the first order "did not take on the dignity of an effective award." *American Mutual Liability Ins. Co. of Boston* v. *Lowe*, 13 F. Supp. 906, 907 (D.N.J.), *aff'd*, 85 F.2d 625 (3 Cir. 1936). We believe this case to be wholly distinguishable particularly since both opinions rest primarily on the failure to file a *signed* order. 13 F. Supp. at 907 (citing *Howard* v. *Monahan*, 33 F.2d 220 (S.D. Tex. 1929)).

clerk cannot be allowed to overcome it. The Act, like many other administrative review statutes, does not seem even to encompass the "excusable neglect" escape hatch provided for untimely appeals from the district courts. But even if it should be construed as doing so, this would be a most inappropriate case for granting relief. The clerk made the pardonable error of notifying the attorney rather than the parties, exactly what a clerk of a district court is directed to do, F.R.Civ.P. 5(b) and 77(d), and the attorney offers no explanation for having failed to file the petition within the allotted time.

IV. Motion to Dismiss Petition in Scaffidi's Case As Not Presenting a Justiciable Controversy.

In the proceedings up through the decision of the ALJ, the caption of this case named both Pittston and Gulf Insurance Company, its insurance carrier, as respondents; both were represented by the same attorney. After the ALJ's decision the insurance carrier paid the award and chose not to contest it further. Pittston then engaged its present attorney who altered the caption. Apparently the claimant made no point before the BRB that the carrier's payment of the award mooted the case; he does now. Despite the general rule that objections not raised before an administrative body cannot be raised on review, we must consider this one since it goes to our jurisdiction.

We see no basis on which a reversal of the BRB's decision would enable the insurance carrier to recover from Scaffidi a payment the liability for which it chose not to contest, and Pittston, which was invited to file a reply brief on the issue, does not suggest one. Cf. *Federal Insurance Co.* v. *Detroit Fire & Marine Insurance Co.*, 202 F. 645 (6 Cir.), *cert. denied*, 229 U.S. 620 (1913) (insurer which paid its share of loss and failed to join other subrogated insurers in third party suit held entitled to recover ratable share of damages won). Pittston

claims instead that it is nonetheless a "person adversely affected or aggrieved" by the BRB's order, 33 U.S.C. § 921(c), since the award will adversely affect its experience rating and thus increase its future premiums. Cf. *Travelers Insurance Co.* v. *Belair*, 284 F. Supp. 168 (D. Mass. 1968).

Pittston's contention that this interest affords it standing immediately encounters *Gange Lumber Co.* v. *Rowley*, 326 U.S. 295 (1945). The Court there held that the appellant-employer had failed to make a showing of substantial injury to any legally protected interest which would entitle it to question the validity under the due process clause of a state statute retroactively extending the time period in which workmen's compensation awards could be modified. Under the state's system, all awards were paid out of a state insurance fund supported by employer contributions of "premiums." Rejecting the employer's argument that its future premium rates would be adversely affected by the increased award, the Court held that the effect of any one accident was too minimal and its possible injury to the employer too speculative to establish the justiciability of the case.[7]

The *Gange* decision, however, has been severely criticized by Professor Davis. He notes that under the state statutes the employer was permitted to appeal, and characterizes the result as "unique," "the extreme one of denying the employer's standing even though the statute conferred such standing." 3 *Davis, Administrative Law Treatise* § 22.13, n.4 (1958). It may well be that under the more liberal concepts of standing developed in such

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[7] *Gange Lumber Co.* was followed in *Railway Express Agency* v. *Kennedy*, 189 F.2d 801 (7 Cir.), *cert. denied*, 342 U.S. 830 (1951) (denying employer standing to challenge unemployment compensation payments to striking workers from federal fund). Cf. 2A *Larson, Workmen's Compensation Law* § 77.30 (1976 ed.) (damage action by employer against negligent third party for increased premiums would lie).

cases as *Ass'n of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), and *Barlow* v. *Collins*, 397 U.S. 159 (1970), *Gange Lumber Co.* would not be followed. However, even on the standing issue alone, an overruling of *Gange Lumber Co.* would hardly carry the day for Pittston on this record where it has submitted nothing but conclusory assertions of adverse effect on future premiums.[8]

However all this may be, the liberalization of notions as to what makes a person "adversely affected or aggrieved" does not eliminate the requirement that in order for a controversy to be justiciable, the court must be able to afford effective relief. See *Simon* v. *Eastern Kentucky Welfare Rights Org.*, —— U.S. ——, 44 U.S.L.W. 4724 (June 1, 1976); *Warth* v. *Seldin*, 422 U.S. 490, 504-05 (1975); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971); *Local No. 8-6, Oil, Chemical & Atomic Workers Internat'l Union, AFL-CIO* v. *Missouri*, 361 U.S. 363, 367 (1960); *St. Pierre* v. *United States*, 319 U.S. 41, 42 (1943); *McKee* v. *Turner*, 491 F.2d 1106 (9 Cir. 1974). As indicated, Pittston has not claimed that Scaffidi will not retain his award even if we should reverse the BRB; what it is asking is simply an advisory opinion that the award should not have been made.[9] We do not doubt

[8] There is no proof that payment of this one award would affect the premiums of such a large employer as Pittston. Moreover, we are not told whether the arrangements between Pittston and its insurance carrier allow the latter to take advantage of an award made without Pittston's consent in determining Pittston's ratings and, if so, whether a reversal by us would change matters.

[9] *Jaabeck* v. *Theodore A. Crane's Sons Co.*, 238 N.Y. 314, 318 (1924), cited by the petitioner in its reply brief, is wholly inapposite. A state workmen's compensation board had entered an award against both the employer and its insurer, one of the questions determined by the board being that of the insurer's liability under the insurance contract. The Appellate Division affirmed the award as to the employer but reversed as to the insurer on the ground that the policy did not cover the risk. The employer appealed to the Court of Appeals, which reversed the Appellate Division with respect to the insurer, affirming in full the order of the State Industrial Board. The employer was clearly aggrieved by the order of the Appellate Division and the Court of Appeals gave effective relief by reinstating the order of the State Industrial Board.

that where insurance only partially covers the liability, the employer may appeal from a judgment even though the insurer has paid its part. See *Moore* v. *Columbia Casualty Co.*, 174 F. Supp. 566 (S.D. Ill. 1959); *Queen Ins. Co. of America* v. *Meyer Milling Co.*, 43 F.2d 885 (8 Cir. 1930). But where the issue of liability is determined against an insured and its insurer, and the insurer pays the damages in full even without the consent of the insured and chooses not to appeal, the insured cannot appeal from the judgment against him. *Ross* v. *Stricker*, 153 Ohio St. 153, 91 N.E.2d 18 (1950), discussed in 19 *Couch on Insurance 2d* § 78.228. In short, as the Supreme Court has said, albeit in a different context, once an insurer "has paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name." *United States* v. *Aetna Casualty & Surety Co.*, 338 U.S. 366, 380-81 (1949); *Link Aviation, Inc.* v. *Downs*, 325 F.2d 613 (D.C. Cir. 1963). See also *Zauderer* v. *Continental Casualty Co.*, 140 F.2d 211 (2 Cir. 1944). This seems a reasonable application of the general rule that a party who has no interest in a fund cannot appeal from an order disbursing the fund. *Seaboard Surety Co.* v. *United States*, 306 F.2d 855 (9 Cir. 1962), and cases cited at 306 F.2d at 859, n.6. We therefore dismiss Pittston's petition.[10]

[10] An additional reason for this conclusion is that once the insurance carrier has paid, without preserving its right to recover the payment by taking an appeal, the case lacks the necessary quality of adversariness. We see no reason why a person in Scaffidi's position should bother to defend against a petition to review or why the BRB or the Director should spend the Government's resources in such a case, even though that was done here.

V. Interpretation of the Statute

With these preliminaries out of the way, we can now undertake our main task—the interpretation of the coverage clauses of the 1972 Amendments.

Admitting as they must that the Amendments worked some extension of coverage, petitioners and the National Association of Stevedores (NAS), as *amicus curiae*, would limit this to factual situations generally comparable to those in *Nacirema Operating Co., Inc.* v. *Johnson*, 396 U.S. 212 (1969). There the Court held that the Act, as it then stood, did not cover longshoremen killed or injured on a pier while attaching cargo from railroad cars to ships' cranes for removal to the ships, although coverage presumably would have existed had they been hurled into the water, *Marine Stevedoring Corp.* v. *Oosting*, 238 F. Supp. 78 (E.D. Va. 1965), *aff'd*, 398 F.2d 900 (4 Cir. 1968) (en banc),[11] or injured on deck while performing part of the same operation, *Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114 (1962). Resting its decision solely on statutory grounds, the Court said that "[t]he

[11] *Nacirema Operating Co., Inc., supra*, reversed the *en banc* decision of the Fourth Circuit in *Marine Stevedoring Corp., supra*. Four cases were before the court of appeals in the consolidated appeal; in only three cases were petitions for *certiorari* filed and granted. Those three cases involved employees injured on the pier as described above whom the Deputy Commissioner had ruled were *not* covered by the LHWCA. The district courts had affirmed the Deputy Commissioners' denial of awards, and were reversed by the Fourth Circuit. In the fourth case (the title case in the court of appeals), the employee, also on the pier, had been injured while lifting a cable off the stern bollard of a vessel when it suddenly straightened, catapulting him into a river where he drowned. The Deputy Commissioner had found that the employee was covered under the Act, his award was affirmed by the district court and by the court of appeals, and it was not before the Supreme Court in *Nacirema*. Mr. Justice Douglas noted in his dissent that "[i]t is incongruous . . . that in an accident on a pier over navigable waters coverage of the Act depends on where the body falls after the accident has happened." 396 U.S. at 225.

invitation to move" the line dividing the coverage of LHWCA "landward must be addressed to Congress, not to this Court," 396 U.S. at 224. Petitioners argue that the BRB's rationale in effect reads the "status" requirement out of the Act by affording coverage to any longshoreman injured on a pier no matter what he is actually doing when injured.

The respondent employees, the International Longshoremen's Association (ILA), as *amicus curiae*, and the Solicitor of Labor (see note 5, *supra*) contend that the extension was much more substantial. Their position is that the process of unloading a vessel continues until the cargo is deposited on the consignee's truck on the pier (or begins, in the case of loading, when the goods are being removed from the delivery truck), and that anyone physically participating in this process is engaged in "maritime employment." We disagree with petitioners, without having to decide whether we would go to the full extent urged by their adversaries.

A.

We begin our analysis by remarking on the unsatisfactory state of the records before us, even if we include for this purpose the two petitions which we have dismissed. When cases of this nature began coming to the BRB shortly after the enactment of the Amendments, it should have realized that it was faced with a major task of statutory construction in determining what constitutes "maritime employment" or being a "longshoreman or other person engaged in longshoring operations"—which task could be performed satisfactorily only in the light of an extensive factual background detailing the structure of work on the various piers of this country. The following are illustrative of facts we would like to know but on which these records shed little or no light, even as regards the port of New York, let alone the rest

of the nation. Does one gang normally take cargo off or on the ship while another is responsible for transportation beyond the "point of rest"? Does the same gang always, sometimes, or often perform both jobs? Is all work on the pier normally conducted by a single employer or is there a division between the stevedore and the "terminal operator"? Even if there is only one employer, does he segregate the employees in their work assignments, by having different collective bargaining agreements or otherwise? Are separate charges made for services beyond the "point of rest" and, if so, for what? Does the "point of rest" shift about on the same pier? Just what is the normal practice for stripping and stuffing containers with goods belonging to different owners or destined to different consignees? Is this work normally done on the pier or in warehouses not adjoining navigable waters? What determines the choices? Does the hazardous nature of the employment stop at the point of rest or continue so long as the cargo is on the pier? Do the hazards change in frequency or degree as the longshoreman moves away from the water? The consolidation of several cases presenting different factual situations in a single large proceeding might have enabled the BRB to make meaningful distinctions. Instead of developing such a record and laying down guidelines for the ALJ's, the BRB has handled each case on an individual basis,[12] and without establishing any record support for the interpretive rules announced therein.

If we were sitting as a court of last resort, we would remand these cases to the BRB on our own motion with

[12] We were told at argument that in the *I.T.O.* case the NAS tendered to the BRB a "Brandeis brief" intended to give the BRB some of the general information we have mentioned, outlining the division of labor in 45 ports in the United States; that the tender was rejected on the objection of the Solicitor on behalf of the Director, OWCP; but that the document was discussed at oral argument in the Fourth Circuit and has been referred to in other decisions of the BRB. We have not had even that much assistance.

directions to cause such a hearing to be held. But with the cases in their present posture in this circuit and others, we think it more helpful for us to state our views on what is now before us."

B.

Perhaps the most useful way to approach the issue is to begin by discussing certain arguments we have not found to be particularly helpful.

(1) *The "presumption" of coverage, 33 U.S.C. § 920.* The claimants, the Solicitor of Labor, and the ILA place great reliance on a provision in the LHWCA as originally adopted in 1927, 33 U.S.C. § 920, and still in effect, that four things shall be presumed in the absence of substantial evidence to the contrary. One of these is "[t]hat the claim comes within the provisions of this chapter." 33 U.S.C. § 920(a). They contend that if the meaning of the new coverage provision, 33 U.S.C. § 903, is in any way doubtful, this presumption requires the doubt to be resolved in favor of coverage. We do not think this was what Congress had in mind; the very fact that the presumption can be overcome by substantial contrary evidence indicates its inapplicability to an interpretive question of general import such as this. See *Crowell* v. *Benson*, 285 U.S. 22, 64-65 (1932).

Even in cases holding that the accordion-like phrase "arising out of and in the course of employment," 33 U.S.C. § 902(2), could be widely stretched, the Court has done little more than mention the presumption, *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469, 474 (1947); *O'Keeffe* v. *Smith, Hinchman & Grylis Associates, Inc.*, 380 U.S. 359, 361 (1965) (per curiam), resting its decision mainly on the principle with respect to the scope of

[13] If one or more of the other circuits seized of this problem should order such a remand, we would entertain a petition for rehearing to enable us to do the same.

review discussed below. In *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), the Court did not rely on the presumption at all, even in the face of a strong dissent. The Court's decisions dealing with questions of coverage of the sort presented here will be searched in vain for any mention of the presumption, see, e.g., *Parker* v. *Motor Boat Sales, Inc.*, 314 U.S. 244 (1941); *Norton* v. *Warner Co.*, 321 U.S. 565 (1944); *Calbeck* v. *Travelers Ins. Co., supra*, 370 U.S. 114 (1962); *Nacirema Operating Co., Inc., Inc.* v. *Johnson, supra*, 396 U.S. 224 (1969),[14] although in *Norton* and *Nacirema* coverage was rejected. The cases in this court, *Michigan Mutual Liability Co.* v. *Arrien*, 344 F.2d 640, 645-46 (2 Cir.), *cert. denied*, 382 U.S. 835 (1965), and *Overseas African Construction Corp.* v. *McMullen*, 500 F.2d 1291, 1296 (2 Cir. 1974), likewise treat the presumption as merely an embodiment of the "rule . . . that so long as any reasonable inference from the facts supports jurisdiction under the statutory presumption that jurisdiction may be found." 500 F.2d at 1296. Here the question is not whether a line established by Congress is sufficiently elastic to include the claimant; the main issue is whether Congress placed the line at the "point of rest" or much further landward. Only if we have made the latter basic decision might the presumption come into play in ruling on cases near the border. See *Davis* v. *Department of Labor*, 317 U.S. 249 (1942).

(2) *"Deference" to the BRB.* We likewise see no merit in the contention of claimants and the Solicitor of Labor that we are confined in our decision because of the deference owed to the BRB. We agree that the standard of review we must apply is that factual findings of the BRB are conclusive if supported by substantial evidence in the record considered as a whole since, as held in *Potenza* v. *United Terminals, Inc.*, 524 F.2d 1136 (2 Cir. 1975), it is of no moment that 33 U.S.C. § 921(b)(3) while applying this standard to the BRB's review of the ALJ's findings of fact does not expressly extend it to review in the court of appeals. But we are still confronted with the ever troubling question whether the determination at issue, namely, whether the 1972 Amendments should be so interpreted as to include these claimants, is the kind of question which justifies or requires judicial deference.

We think it is time to recognize, in line with Professor Kenneth Culp Davis' brilliant discussion, 4 Administrative Law Treatise §§ 30.01-.09 and the corresponding sections in the 1970 Supplement, that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand.[15] Leading cases supporting the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if

[14] In *Davis* v. *Department of Labor*, 317 U.S. 249, 256 (1942), the Court noted that with respect to the largely "factual questions" relating to whether an employee injured within the "twilight zone" of federal jurisdiction established by the Court should be compensated under state or federal law, "presumptive weight" should be given to the findings of the federal or state administrator of the respective program, and relied in part on § 920(a).

[15] Our discussion of the Court's ambivalence with respect to deference is not to be read as dealing with two problems quite different from that here presented. One concerns an agency's exercise of power to formulate substantive rules, where the scope is wide, see, e.g., *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232 (1936); *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944), and the rules once issued, even if only in the form of guidelines, are "entitled to great deference," *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 430-36 (1975). The other concerns an agency's construction of its own rules, see, e.g., *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *TSC Industries, Inc.* v. *Northway, Inc.*, —— U.S. ——, —— n.10 (1976), 44 L.W. 4852, 4855 n.10 (1976).

without rational basis are *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 146 (1939); *Gray* v. *Powell*, 314 U.S. 402, 411-12 (1941); and *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944). The rationale of these decisions was applied in the three "arising out of and in the course of employment" Supreme Court cases under the LHWCA—*Cardillo, O'Leary and O'Keeffe*, cited above. Indeed, the Court seems to have rejected the findings of the LHWCA's Deputy Commissioners only once since the statute was enacted, *Norton* v. *Warner Co.*, *supra*, 321 U.S. 565. However, there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term. Illustrative cases are *Office Employees International Union, Local No. 11, AFL-CIO* v. *NLRB*, 353 U.S. 313 (1957), and *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 150 (1944). In one of its most recent decisions on the subject, *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974), the Court held that "In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose"; this very nearly eliminates the "deference" principle as regards statutory construction altogether since if the agency's determination is found by a court to be consistent with the congressional purpose, it presumably would be affirmed on that ground without any need for deference.

There are several other reasons not to rest decision on the "deference" approach in these cases. One is that unlike the F.C.C. in the *Rochester Telephone* case, the Bituminous Coal Division of the Department of the Interior in *Gray* v. *Powell*, or the NLRB in the *Hearst* case, the BRB is not a policy making but entirely an umpiring agency. When Congress has charged an agency with the duty to make and implement a national policy, it is more likely that Congress intended the agency to have

some flexibility, free from judicial intrusion, in interpreting the Congressional grant. Compare *Rochester Telephone Corp.* v. *United States*, *supra*, 307 U.S. at 146; Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968). A second factor is the way in which the agency has gone about its job. As suggested above, we would be much more inclined to defer to a considered judgment of the BRB rendered on a full record than to this series of short opinions on isolated facts which contain no in-depth study of the problem. A somewhat related point is that although the BRB's decisions have been "consistent and contemporaneous," the issue arose almost immediately after the 1972 Amendments became effective at a time when the BRB had little experience in the administration of the Act; yet its initial decisions, surely not the result of any great expertise, became the basis for all the others. "[A]n agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973). Finally, this is a case where understanding of the statute depends in no small measure on prior judicial decisions and legislative history—subjects on which a court has a greater competence than the BRB. We therefore reject the argument that the BRB's decisions in these cases must be affirmed if they are rational but wrong.

(3) *Other definitions.* We likewise give little weight to arguments made on both sides which are based on definitions of "longshoreman" or maritime employment or contracts formulated in different contexts and for different purposes. The ILA relies on Congress' approval, Act of Aug. 12, 1953, ch. 407, 67 Stat. 541, of definitions (reproduced in the margin)[16] in a compact between New

[16] See ILA Amicus brief at 5-6 n.1. The definitions in the Bi-State Compact can be found at § 9806 of McKinney's Unconsolidated New York Laws and § 32:23-6 of N.J.S.A.

[Footnote continued on page 28a]

York and New Jersey creating the bi-state Waterfront Commission. To assume that the 1972 Congress had in mind this action of its predecessor of 1953 is to attribute a degree of acumen few Congressmen would claim. Beyond that, the purposes of the two enactments were quite different; it is for that reason that paragraph (1) of the Waterfront Commission Act includes persons, notably clerical workers, clearly not embraced under the most liberal construction of the 1972 Amendments.

On the other hand, a narrow definition of "longshoring operations" [17] formulated by the Secretary of Labor in

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[16] [Continued]

"Pier" shall include any wharf, pier, dock or quay.

"Other waterfront terminal" shall include any warehouse, depot or other terminal (other than a pier) which is located within one thousand yards of any pier in the Port of New York district and which is used for waterborne freight in whole or substantial part.

"Longshoreman" shall mean a natural person, other than a hiring agent, who is employed for work at a pier or other waterfront terminal, either by a carrier of freight by water or by a stevedore

(a) physically to move waterborne freight on vessels berthed at piers, on piers or at other waterfront terminals, or

(b) to engage in direct and immediate checking of any such freight or of the custodial accounting therefor or in the recording or tabulation of the hours worked at piers or other waterfront terminals by natural persons employed by carriers of freight by water or stevedores . . . .

"Stevedore" shall mean a contractor (not including an employee) engaged for compensation pursuant to a contract or arrangement with a carrier of freight by water, in moving waterborne freight carried or consigned for carriage by such carrier on vessels of such carrier berthed at piers, on piers at which such vessels are berthed or at other waterfront terminals.

[17] * * * the loading, unloading, moving or handling of cargo, ships stores, gear, etc., into, in, on, or out of any vessel on the navigable waters of the United States.

25 Fed. Reg. 1566 (1960), 29 C.F.R. 9.3(i).

1960 as part of safety regulations issued in respect of "all employments covered by this chapter," 33 U.S.C. § 941(a), is likewise not dispositive of the meaning of the words used in the Amendments since under the old statute covered employment was limited to injuries occurring "upon the navigable waters of the United States (including [only] any drydock)." And despite the definition of "carriage of goods" as covering "the period from the time when the goods are loaded on to the time when they are discharged from the ship" contained in the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1301(e), we have held that the contract of carriage, obviously a maritime contract, persists after unloading and that the carrier remains liable, not as a carrier but as a bailee, until it delivers the cargo to the consignee or places it in a public dock or warehouse. *David Crystal, Inc.* v. *Cunard Steamship Co.*, 339 F.2d 295, 298 (2 Cir. 1964), *cert. denied*, 380 U.S. 976 (1965); *Leather's Best, Inc.* v. *S.S. Mormaclynx*, 451 F.2d 800, 811-12 (2 Cir. 1971); *Cameco, Inc.* v. *S.S. American Legion Lines*, 514 F.2d 1291, 1295-96 (2 Cir. 1974).

(4) *Liberal construction of remedial legislation.* There is more force in the contention of the claimants and the Solicitor that a broad reading of the 1972 Amendments is required by the oft-iterated principle that remedial legislation should be construed liberally. The Supreme Court said, as to this very statute, although in a quite different context, *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953):

> This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.

Petitioners do not altogether overcome this point by arguing that a statute must be construed with reference to the mischief intended to be overcome, see *Heydon's*

Case, 3 Co. Rep. 7a, 76 Eng. Rep. 637 (1584), and that all that Congress intended to "remedy" was the unjust result of *Nacirema Operating Co.* v. *Johnson*, *supra*, 396 U.S. 212, by accepting the invitation which, pursuant to Mr. Justice White's suggestion, the unions extended to it.[18] The statutory language can fairly be read to do more than that and thus the liberality principle tends in favor of such a reading.

C.

With this background we address ourselves at long last, to the words of the statute with the aid of the legislative history. There is no question that claimants met the situs test of § 903(a),[19] and concededly all worked

[18] The argument, in fact, flounders on a number of points. The invitation issued in *Nacirema* was broadly phrased:

> There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act. And construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court.

396 U.S. at 223-24. The Court contemplated at least two possibilities: an extension of the LHWCA to cover longshoremen injured on a pier "while loading or unloading a ship," or an extension to "coincide with the limits of admiralty jurisdiction." In the absence of clarifying legislative history, we would have no idea which set of evils referred to in *Nacirema* Congress was endeavoring to overcome.

[19] In the Blundo case the petitioner, I.T.O. makes a halfhearted argument that Blundo was not injured on the navigable waters within the expanded definition because the 19th Street pier on which he

for covered "employers" under the Act; the question is whether each—now Blundo and Caputo—was a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . . ." § 902(3).[20]

If there were any doubt on the face of the statute, the legislative history makes clear that § 902(3), as here relevant, is to be construed no differently than if it said "any longshoreman or other person engaged in longshoring activity or engaged in other maritime employment." Cf. *Argosy Limited* v. *Hennigan*, 404 F.2d 14, 20 (5 Cir. 1968); *United States* v. *Gertz*, 249 F.2d 662, 666 (9 Cir. 1957). The Senate Committee on Labor

was injured was not used for the loading or unloading of vessels. This argument flies in the face of the statute, which reads ". . . including *any* adjoining pier . . . *or other adjoining area* customarily used by an employer in loading, unloading, repairing, or building a vessel." (Emphasis added.) It would seem that any pier next to the water is included within the situs definition. Accord, *I.T.O. Corp. of Baltimore* v. *Adkins*, *supra*, 529 F.2d at 1083-84. The testimony before the ALJ established that Blundo was injured at one of two "finger" piers which jutted into the water from the terminal. The entire terminal adjoined the water and was enclosed by a single gate. The finger pier at 21st Street was used for vessels; the finger pier at 19th Street was used to load and unload containers. Blundo was clearly on a "pier" and a "terminal" adjoining the water, a part of which was used for loading and unloading vessels. This is sufficient.

[20] Judge Craven, dissenting from the panel opinion in *I.T.O.*, advanced the argument, although he did not base his conclusion on it, that this phrasing might make the inquiry too narrow, since § 902(3) also includes "any harborworker," 529 F.2d at 1090 n.3. He cited the statement in 1 *Norris, The Law of Maritime Personal Injuries* § 3 (3d ed. 1975), that the longshoreman is only "[f]irst in the catalogue of harbor workers." Arguably, however, Congress intended "harbor workers" to refer only to persons similar to those specifically described ("any harborworker including a ship repairman, shipbuilder, and shipbreaker") and not to persons concerned with the movement of cargo. But see *Norris*, *supra*, § 5. Like Judge Craven we find it unnecessary to decide the point.

& Public Welfare stated, Sen. Rep. No. 92-1125, 92d Cong. 2d Sess., at 13:

> It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.
>
> The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The House Committee Report, No. 92-1441, 92d Cong. 2d Sess. contained identical language.

Secondly, and more important, Congress perceived a need to provide expressly for coverage for "any longshoreman" in addition to what it had established for a person engaged in "longshoring operations." A "longshoreman" may thus be covered at some times even when he is not engaged in traditional longshoring activity. This alone is sufficient to condemn the "point of rest"

doctrine. Petitioners concede that persons engaged in moving unloaded cargo to its first point of rest or moving cargo to be loaded from its last point of rest are engaged in "longshoring operations." If they alone were to be covered, there was no need to provide also for "any longshoreman."

What then did Congress mean by that phrase? Obviously it is not enough that a claimant calls himself a longshoreman or that a longshoreman's union in a particular port has forced employers to hire its members for such unlongshoreman-like positions as clerks or guards. But see *Weyerhaeuser* v. *Gilmore*, *supra*, 528 F.2d at 962.

The reports of the Senate and House committees go a long way toward supplying an answer. Immediately after the two paragraphs quoted above came the following:

> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of

> cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

Two conclusions emerge from this with seeming certainty: One is that Congress was concerned about "the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels," new facts of life on the waterfront which, as this court noted in *Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n*, 426 F.2d 884, 886 (2 Cir. 1970), mean that a good deal more of the longshoreman's traditional jobs are now performed on shore. Stripping a container of goods destined to different consignees is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship even though it is performed on shore and not in the ship's cargo holds. Congress intended to cover men engaged in these activities if they met the situs test contained in the Act—irrespective of the employee's position vis-a-vis a "point of rest." The committees said expressly that "checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment." Congress did not say they were covered only if they "unloaded the container at the stop where a crane had first deposited the container or loaded it at a place on the water's edge; one of the advantages of containers is that they permit loading or unloading to be done at less congested locations. It sufficed for coverage if an accident arising from the stripping or stuffing of containers occurs at a place within the situs test. One answer to petitioners' argument that stuffing or stripping a container on a pier is no different from doing the same job a mile away is that Congress may have doubted its power, under the admiralty clause of Article III, to go further than it did. This would decide Blundo's case if he had been "checking" the container at the pier where it was first deposited even if it had been moved several times. We fail to perceive any significant difference because, for the convenience of someone, it had been moved to another pier. The cargo had not yet been delivered to the consignee; the unloading process still had not been completed.[21]

The second conclusion is that Congress was concerned with providing uniformity of coverage for persons engaged in the loading or unloading functions on the piers. It wished to minimize the occasions when longshoremen and other harbor workers would be walking from the liberalized benefits of LHWCA to the much lower ones provided by state compensation laws.[22] Petitioners argue

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[21] As many admiralty cases have decided, in construing other doctrines of maritime law, a realistic view of the loading or unloading process recognizes that it does not stop as soon as the cargo first hits the pier on being removed from a vessel, nor does it begin only when the cargo stands on the pier next to the vessel on which it is about to be loaded. See *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 214 at n.14 (1971), *rev'g on other grounds Law* v. *Victory Carriers, Inc.*, 432 F.2d 376 (5 Cir. 1970). Frequently large gangs of longshoremen, dozens of men, are assigned different tasks in a continuous process which moves cargo off a vessel ultimately to a warehouse or storage area at the far end of the pier or terminal. *Garrett* v. *Gutzeit*, 491 F.2d 228 (4 Cir. 1974).

[22] Joseph Leonard, Safety Director of the ILA, in speaking to the House Committee about the former coverage provisions, asked, "What do we do, cut ourselves in half?" Hearings on H.R. 247, H.R. 3505, H.R. 12006, and H.R. 15023 (Longshoremen's & Harbor Worker's Compensation Act Amendments of 1972), before the Select Subcomm. on Labor of the House Comm. on Educ. & Labor, 92d Cong., 2d Sess., 297.

that Congress was concerned with providing uniformity only in the *Nacirema* situation, where the same employee engaged in the same unloading or loading operation would have been protected by the federal statute if a draft of cargo hit him while he was on the ship but not if his injury occurred on the pier itself, and point to the fact that the illustration used by the committees was a case where cargo is "unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters." But the committees stated their intention more broadly—"to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." The concern for uniformity was not limited to rectifying the disparity between the longshoreman making up the draft on the ship and the longshoreman receiving it on the pier; it extended to the disparity that would result if a line were drawn between the latter and a longshoreman, perhaps the very same one, who moved the unloaded cargo to another place on the pier.[23] The committee's language clearly is broad enough to cover a person like Caputo who spent a significant part of his time in working on vessels, so long as he did not come within the category mentioned as being excluded—employees who are not engaged in loading or unloading a vessel, "|t|hus, employees whose responsibility is only to pick up stored cargo for further trans-shipment."

Petitioner asserts that Caputo came within both descriptions of excluded persons. Clearly he did not come within the second. His responsibility was to perform a variety of jobs on the pier, on both sides of the "point of rest," including going on vessels. Also we would not

[23] Congress also expressed interest in extending federal coverage to as many longshoremen as possible to avoid the "disparity in benefits payable . . . for the same type of injury depending on . . . in which State the accident occurs." Senate Committee Report, *supra*, at 12.

regard the cargo as "stored" within the committees' meaning simply because the consignee had delayed five days in picking it up.[24] The question whether he was engaged in loading or unloading (here unloading) is closer. If his injury had occurred while he was moving the boxes of cheese from a previous position on the pier to the consignee's trucks, he clearly would have been engaged in "unloading," in the way that term is used in ordinary speech. That being so, it would be wholly artificial to draw a distinction because his injury occurred while he was inside the consignee's truck. See note 21, *supra*. To be sure, the carrier would probably have fulfilled its legal duty if it had instructed the stevedores simply to place cargo alongside consignees' trucks and leave the loading of the trucks to them. But, so far as we can gather from this meagre record, that is not the life of the waterfront. The driver needs help in loading or unloading his truck, it would be uneconomical for him to carry a sufficient supply of helpers, everyone wants the truck off the pier as soon as possible, so the stevedores have their employees lend a hand. It is not clear whether an additional charge is collected for this, but we do not think it matters. Neither do we think it matters that the stevedore might not be liable for mishandling by a longshoreman within the truck.

Petitioners make a significant argument that the high benefits under the Amendments were provided because of the extremely hazardous nature of longshoring and that these extraordinary hazards no longer exist once the cargo is beyond the "point of rest." Indeed, in Caputo's case the parties stipulated that what Caputo was doing was the same, and entailed the same risk of injury,

[24] We thus are not required to decide whether cargo should ever be regarded as "stored" so long as it remains on the pier in the custody of the stevedore employed by the vessel rather than being placed in a public warehouse. Dellaventura's case, where there was a delay of 133 days, might have demanded such a decision.

as exists wherever and by whomsoever trucks are loaded or unloaded with dollies. The Senate Report, p. 2, refers to "high-risk occupations such as those covered by this Act" and says that "[l]ongshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations." What we do not know is what types of operations were considered to be longshoring for the purpose of these calculations. Also, as shown by the case of Blundo, who slipped on ice while he was checking the contents of a container that was being stripped on a pier other than the one where the vessel was unloaded, unusual hazards can exist due to the exposure of piers to the elements which would not exist in a manufacturing plant or in a garage or warehouse where containers removed from trucks were being stripped. Doubtless the hazards of longshoring vary with the particular tasks being performed, and may in some instances be no greater than those encountered by persons doing similar work in places other than piers or terminals adjoining the water's edge.[25] However all this may be, we find nothing in the words of the statute or its legislative history that would enable us to construct a "hazard" test; Congress' intention was rather to provide uniformity of coverage for workers injured while engaged in the process of loading or unloading ships who met the situs test. We note in this connection that the increased benefits inure to shipbuilders meeting the situs test, although much of their work is performed in facilities no more hazardous than those not within the expanded definition of "navigable waters" and that the benefit schedules of LHWCA apply to all industrial accidents in the

[25] But see the statement of Representative Hicks of Massachusetts on the floor of the House. 118 Cong. Rec. 36387 (Oct. 14, 1972). And see House Hearings, supra note 22, at 288-89 (statement of Patrick Tobin, Internat'l Longshoremen's and Warehousemen's Union (ILWU)).

District of Columbia, Act of May 17, 1928, ch. 612, 45 Stat. 600 (1928), 36 D.C. Code § 501 (1973).

In a variation of the argument last considered, petitioners contend that because of the higher benefits payable under LHWCA than under state compensation acts, construing the Amendments to apply beyond the point of rest will increase the already high expenses of stevedores to an extent that Congress could not have intended. Clearly, as explained at the outset, the act was a trade-off—a gain to the stevedores in doing away with the *Sieracki-Ryan* triangle, a gain to the workers in higher benefits and in moving the *Jensen* line shoreward. Just how much added cost Congress meant to impose on stevedores by the second part of the bargain is impossible to determine.[26] What is clear is that Congress had a profound distaste for a regime in which employees engaged in the rough and tumble work described in the Amendments should be covered under the Federal Act at one moment and under state acts at another.

We therefore hold that the Amendments at least cover all persons meeting the situs requirements (1) who are engaged in stripping or stuffing containers or (2) are engaged in the handling of cargo up to the point where the consignee has actually begun its movement from the pier (or in the case of loading, from the time when the consignee has stopped his vehicle at the pier), provided in the latter instances that the employee has spent a sig-

[26] It is worth noting that the increased benefits provided by the Amendments followed recommendations of the National Commission on State Workmen's Compensation Laws (Sen. Rep., p. 4), and that Congress may well have expected that enactment of the Amendments would have an effect on state compensation laws. Hearings on S. 2318, S. 525, and S. 1547 (Longshoremen's & Harbor Worker's Compensation Act Amendments of 1972) before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 92d Cong., 2d Sess., at 74 (statement of James O'Brien, Ass't Dir. Soc'l Sec. Dep't, AFL-CIO), 149 (statement of Joseph Leonard, Safety Director, ILA).

nificant part of his time in the typical longshoring activity of taking cargo on or off a vessel. That is as far as we need to go to affirm Blundo's and Caputo's awards; whether the proviso is essential can be left for another day.

Petitioners say, as indicated above, that in effect our construction reads the status requirement out of the Act. We concede it goes some way in that direction. But it does not do so completely; we part company with Gilmore & Black when they assert that the commitee reports should be disregarded and the Amendments then "can fairly be read to cover all employment-related injuries which occur within the Act's territorial limits." The Law of Admiralty, § 6.51 at 430 (1975).[27] We believe our position avoids some of the more problematic possibilities lurking in the new "status" requirement, and accords with the liberal interpretation which must be given this remedial statute and its remedial amendments. See Comment, Broadened Coverage Under the LHWCA, 33 La. L. Rev. 683, 693 (1973).

VI. Constitutionality

In so construing the Amendments we have necessarily assumed that the construction would be constitutional. We think that assumption is well founded.

It is beyond dispute that "Although containing no express grant of legislative power over the substantive law, the provision [of Article III as to admiralty and maritime jurisdiction] was regarded from the beginning as

[27] They add that "a female secretary who works in a terminal warehouse should qualify as a LHCA harbor worker in exactly the same way that a female hairdresser in a cruise ship's beauty salon qualifies as a Jones Act seaman." *Id.* We do not find the analogy persuasive. Cruise ships encounter rough weather and may even sink; terminal warehouses don't. Cf. *Malramas* v. *American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2 Cir. 1973).

implicitly investing such power in the United States." *Panama R.R. Co.* v. *Johnson*, 264 U.S. 375, 386 (1924). The classic definition of the jurisdiction was Mr. Justice Story's in *DeLovio* v. *Boit*, 7 Fed. Cas. 418, 444, Case No. 3776 (C.C.D. Mass. 1815) that it "comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality, the former extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea." Mr. Justice Story used the broad term "locality" in his definition of the jurisdiction with respect to "torts, and injuries." Although the Supreme Court later defined locality as including only injuries suffered on navigable waters and not injuries on the land caused by a vessel, *The Plymouth*, 70 U.S. (3 Wall.) 20 (1866), the Court has acquiesced in Congress' overruling that holding by the Admiralty Extension Act, 46 U.S.C. § 740, which was applied without question in *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206 (1963). See also *United States* v. *Matson Navigation Co.*, 201 F.2d 610 (9 Cir. 1953), cited with approval in *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 209 n.9 (1971), in which the Court stated that "if denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Arts. I and III of the Constitution to enact a suitable solution." *Id.* at 216.[28] Most important of all are the statements in *Nacirema*, *supra*, 396 U.S. at 223, that "There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship," and the suggestion that Congress

[28] The Court has also sustained the Jones Act, which accords to seamen a remedy for injuries on land as well as on the sea, as an extension of the remedy of maintenance and cure. *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 40-41 (1943). If *Sieracki* retains any vitality, the constitutionality of the extension of coverage by the Amendments could be supported on this theory.

be invited to do something about this, *id.* at 397. The Court would scarcely have suggested this if it had entertained doubt as to the constitutionality of a Congressional response.

We thus see no reason to question the power of Congress to expand the concept of a maritime tort to include injuries suffered by persons on structures adjoining navigable waters in the course of employment related to ships. If we were more doubtful on the point than we are, we would see no reason why the extension of coverage could not be predicated on the portion of the jurisdiction relating to maritime contracts, where there is no "locality" test. Contracts of employment relating to maritime matters are within that jurisdiction, *Sheppard* v. *Taylor*, 30 U.S. (5 Pet.) 675 (1831), and claims under LHWCA are by an employee engaged in "maritime employment" against an employer.

The petition to review in Dellaventura's case is dismissed as untimely and the petition in Scaffidi's case is dismissed on the ground that there no longer is a justiciable controversy between the employer and the employee. The petitions in Blundo's and Caputo's cases are denied on the merits.

LUMBARD, Circuit Judge (concurring and dissenting):

I agree that Pittston's petition seeking review of the award in Scaffidi's case should be dismissed as there is no justiciable controversy by reason of the insurance carrier's payment of the award. I also agree that Pittston's petition to review Dellaventura's case should be dismissed as untimely filed.

With respect to the denial of the petitions in the Blundo and Caputo cases, I respectfully dissent. As the relevant

considerations have been so ably and extensively set forth here by Judge Friendly and also by Judge Winter in I.T.O. of Baltimore v. Benefits Review Board, U.S. Dep't of Labor and Adkins, 529 F.2d 1080 (4th Cir. 1975), no purpose would be served in any further protracted discussion. I agree with Judge Winter that "[t]he 1972 extension of coverage was intended only to remove inequities and anomalies arising when a person otherwise engaged in 'maritime employment' was injured on land," 529 F.2d at 1081, and with his additional statement that ". . . with respect to longshoremen or other persons engaged in longshoring operations, the Amendments extend only to those employees engaged in loading and unloading activities between the ship and the first (last) point of rest, including checkers 'directly involved in [such] loading or unloading functions,'" 529 F.2d at 1088.

It is more in keeping with the realities of maritime employment to draw the line at the first point of rest in discharging the cargo and at the last point of rest in loading a vessel. Moreover, such a rule is far easier to apply and avoids claims such as that put forward by Dellaventura that he is entitled to compensation for his injury while loading a consignee's truck with coffee bags which had been stored in a warehouse for 133 days after being removed from the ship CAMPECHE. This being so, it seems to me that the interpretation adopted by the Fourth Circuit is more consistent with what the Congress intended and with the language of the 1972 amendment.

Blundo, a checker employed by I.T.O., was injured while checking cargo being removed from a container. The container was located on a stringpiece of the 19th Street pier in Brooklyn, had been unloaded a few days before at a different pier and had been trucked through the streets to the 19th Street pier to be opened there by United States Customs before the container was stripped.

What Blundo did was done well after the container had been left at the first point of rest.

Caputo's principal duties related to terminal labor. When injured he was working at the northeast marine terminal on the Brooklyn waterfront inside the truck of a consignee, while helping the consignee's truck driver load boxes of cheese which had been discharged from a vessel at least five days before. Thus in Caputo's case his activity occurred after the boxes of cheese had come to rest on the pier.

For these reasons I would grant the petition and set aside the awards in the cases of Blundo and Caputo

Decision of the United States Court of Appeals for the First Circuit, July 27, 1976.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1360

JOHN A. STOCKMAN,
Claimant, Respondent,

v.

JOHN T. CLARK & SON OF BOSTON, INC.,

and

AMERICAN MUTUAL LIABILITY INC. CO.,
Employer/Carrier, Petitioners,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Party in Interest.

ON PETITION FROM THE
BENEFITS REVIEW BOARD

Before COFFIN, *Chief Judge,*
McENTEE and CAMPBELL, *Circuit Judges.*

George O. Driscoll for appellants.

Joseph P. Flannery, with whom ***Joseph G. Abromovitz*** and ***Kaplan, Latti and Flannery*** were on brief, for John A. Stockman, appellee.

Linda L. Carroll, Attorney, United States Department of Labor, with whom *William J. Kilberg*, Solicitor of Labor, and *Laurie M. Streeter*, Associate Solicitor, were on brief, for Director, Office of Workers' Compensation Programs, appellee.

July 27, 1976

CAMPBELL, *Circuit Judge.* This petition for review, brought by an employer and its compensation carrier, raises a difficult question of interpreting the 1972 amendments to the Longshoremen's and Harborworkers' Compensation Act (the Act). 33 U.S.C. § 901 et seq.

Working on the Boston waterfront for his employer, John T. Clark & Son of Boston, Inc. (Clark), John A. Stockman sustained an inguinal hernia on October 1, 1973, while removing the contents of a container [1] which had previously been off-loaded from a vessel. Clark and its insurer, acknowledging liability under Massachusetts workmen's compensation law, furnished Stockman with medical care and paid him compensation at the maximum weekly state rate of $80 during the seven weeks that he was disabled. Stockman claimed, however, that he was entitled to be compensated at the much higher rate provided in the Longshoremen's and Harborworkers' Compensation Act. Total benefits payable under the Act for the period of disability in question exceeded those payable under Massachusetts law by more than $700. When Clark and its carrier refused to acknowledge that

[1] Containers are rectangular metal structures used to transport cargo. After being taken off the vessel by crane, they are provided with a chassis and wheels and converted into large box trailers capable of being trailed on the highways by tractors.

Stockman was covered by the Act, the matter was referred to an Administrative Law Judge, § 919, who ruled after hearing that Stockman was covered. Clark and the carrier appealed from this ruling to the Benefits Review Board (the Board), § 921(b) (1976 Supp.), which affirmed the decision of the Administrative Law Judge. Thereafter they brought this petition, § 921(c) (1976 Supp.).

I

The difficulty in determining Stockman's coverage arises from the essential ambiguity of the 1972 amendments insofar as they describe, or fail to describe, the employees for whom coverage is afforded. As was developed at the hearing before the Administrative Law Judge, Stockman was a regular employee of Clark who had for three years prior to his injury worked at Berth 5 of the Boston Army Base, an area adjacent to Boston Harbor. Clark is both a stevedore, i.e. a firm engaging directly in the unloading of vessels, and a terminal operator.[2] Clark's Boston Army Base facility was used

[2] Mr. Kelley, Clark's Treasurer, gave his view of the difference between a stevedoring and a terminal operation as follows:

> "The distinction in the point of rest. Cargo that is—whether it be containers or freight bulk cargo—when the longshore gangs are working the cargo and discharging it and they bring that cargo to a point of rest, either in a shed or outside a shed, and they terminate, they finish their job, that's the end of the stevedoring function, and from that point on the terminal operation function takes over, it's somewhat similar to a warehousing operation."

Under Kelley's theory, once the stevedoring function ended, the work became freight handling.

Stockman, on the other hand, insisted,

> "Cargo is merchandise that's carried in a vessel and I maintain that cargo does not become freight until after it's grounded on the dock [viz. trucking dock] and the truck driver comes in and touches it. ILA [the International Longshoremen's Association, of which Stockman was a member] helps handle it all the way until it's actually taken out of that container. The container in my opinion is more or less part of the ship."

both to unload vessels that berthed there, and to store and warehouse cargo which had either been unloaded there or been brought in containers from vessels berthed elsewhere.

At the time Stockman sustained a hernia, he was at Berth 5 of the Boston Army Base "stripping" (removing cargo from) a container. The container had been discharged from a vessel that had berthed during the previous three days at Berth 17, Castle Island, a facility located approximately two miles by land or 700-800 feet across water from the Boston Army Base. Under the terms of its contract with Sea-Land Corporation, the owner of the container, Clark was "to unload vessels as they come into port [and] discharge the containers." However, Sea-Land's container vessels did not dock at the Army Base since they require a special crane and berth not available there. Sea-Land's vessels berthed instead at Castle Island, where the containers were put ashore; chassis with wheels were provided; and those containers having full loads for a particular consignee were hitched to a truck-tractor and hauled directly to their ultimate destinations, to be unloaded by the consignee. Some containers would not, however, contain a full load for one consignee and it was up to Clark to strip them, separate their contents by orders, and hold the goods for pickup by consignees. In such cases, as there were no facilities at Castle Island either for stripping or for "stuffing" (placing cargo in) containers, the containers would first be hauled by an independent trucking firm, engaged by Sea-Land, to Clark's Boston Army Base facility. There Clark would remove the contents from the containers, place them on pallets, and hold them for pick-up by truckers for the various consignees. The container Stockman was stripping had been hauled overland from Castle Island by a truck furnished by the

Boston-Taunton Transportation Company under contract with Sea-Land; and Stockman was removing the contents and placing them on pallets at Berth 5 of the Boston Army Base when he sustained his injury.

At the hearing various descriptions were offered of Stockman's job-title. Mr. Kelley, Clark's treasurer, called Stockman a "freight handler" as "that's the insurance code classification that he would fall under". Stockman himself testified that he was classified as a crane operator and for casual work on the dock. He said he drove chisels, stuffed and stripped containers, and shifted cargo. The parties stipulated that Stockman was "employed as a longshoreman with collateral ratings as a cooper and extra dock laborer". Stockman was a member of the International Longshoremen's Association, AFL-CIO, and Clark a member of the Boston Shipping Association, Inc. Under an agreement between the ILA and the Shipping Association, containers within 50 miles of a port (other than ones handled by the "beneficial owners" of the cargo) had to be stuffed and stripped by ILA longshore labor working on a "waterfront facility, pier or dock."

The relevant provisions of the Act against which Stockman's claim of coverage must be measured are §§ 902 (3), 902(4) and 903(a), all as amended in 1972. Section 903(a), entitled "coverage", is sometimes referred to as the "situs" requirement, and provides as follows:

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . ."

Section 902(3), sometimes referred to as the principal "status" requirement, defines and limits the term "employee" to,

> "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker [exclusive of a master or member of a crew of any vessel, or any person engaged to load, unload or repair any small vessel under eighteen tons net]."

There is also the following definition of "employer" in § 902(4),

> "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

The Administrative Law Judge, whose reasoning the Benefits Review Board affirmed, ruled that Stockman's injury occurred at a location within the situs requirements of § 903(a). He found that Stockman was employed to unload containers at Berth 5 of the Boston Army Base; that Berth 5 adjoins navigable waters "and is used for the general cargo operations of loading and unloading vessels, although the stripping of containers received from Berth 17, Castle Island is considered a terminal operation"; and that Stockman's injury met the Act's situs requirements since wharf and terminal areas are specifically mentioned in § 903(a). The Administrative Law Judge attached no weight to the fact that the container had not been discharged from a vessel at Berth 5 of the Boston Army Base but had been driven two miles overland from Castle Island, Berth 5 being,

in any event, a "terminal adjoining navigable waters". And even were this not so, Clark's Army Base facilities were an "other adjoining area customarily used by an employer in . . . unloading . . . a vessel," since any and all Sea-Land containers that were to be stripped were customarily trucked there from Castle Island as an integral step in the process of unloading a vessel.

The Administrative Law Judge went on to rule that Clark, being both a stevedore and terminal operator, was an "employer" within § 902(4) since it employed longshoremen to perform some of this work.

Finally, the Judge held that Stockman met the status definition of "employee" under § 902(3), being engaged in "maritime employment". The Judge thought that little attention should be paid labels such as longshoreman or "freight handler". Stating that it was not the label given but "the nature of the work being performed" that was determinative, the Judge held that "[u]ntil the contents were removed from the containers the unloading procedure had not been completely executed. The unloading of this container was an integral and sequential part of the process of unloading cargo from a vessel. *Cf. Powell* v. *Cargill, Inc.*, [74-LHCA-172 (October 8, 1974)]; *Richardson* v. *Great Lakes Storage & Contracting Co., et al.*, 74-LHCA-223 (October 18, 1974)". The Judge continued,

> "The fact that the containers had to be trucked two miles across the channel for unloading is not significant. The containers, at this point, were not being picked up from storage for further transshipment, but were merely being transported for unloading. If the containers had been stripped by longshoremen at the Castle Island facility where they arrived, this work activity would, in my view, have been clearly covered by the Act. Claimant should not be denied the protection and coverage

> of the Act merely because circumstances required his Employer to have longshoremen perform the stripping function at another waterfront facility two miles away. *Cf. Crampton* v. *Cargill, Incorporated*, 74-LHCA-215 . . . . Such a finding would not be within the "humanitarian goals" of the Act.
>
> . . . I hold that the Claimant was injured in a shoreside area while he and his Employer were engaged in maritime employment within the coverage of the Act."

In affirming, the Benefits Review Board held it to be "now well settled" that a claimant like Stockman was within the jurisdictional reach of the Act. It said that stripping and stuffing containers were "maritime employment", and that the temporary resting of containers for three days prior to stripping was immaterial to the maritime nature of the employment.

III

While the Board's determination is consistent with its other recent rulings finding coverage for most handlers of ship's cargo at piers and waterfront terminals, whatever their precise function, judicial decisions to date construing the 1972 amendments reflect a sharp difference of opinion over the reach of the Act. A divided panel of the fourth circuit has ruled that terminal employees, as distinct from those immediately engaged in taking cargo from (or putting it on) a vessel lying at its berth, are not covered even when injured in an area more immediately adjacent to the ship's berth than was the Boston Army Base here. Terminal employees are not, in its view, engaged in maritime employment within the meaning of § 902(3). *I.T.O. Corp.* v. *Benefits Review Board*, 529 F.2d 1080 (1975), reargued en banc May 4, 1976. The court felt that while the 1972 amendments enlarged the "situs" so as to provide compensation for injuries occurring at designated shoreside facilities as well as on shipboard, they narrowed the "status" requirement so as to limit coverage to only maritime workers engaged most directly in traditional employment, e.g., in cases of longshoremen, those immediately engaged, at the time of injury, in the direct loading or unloading of a vessel itself. To give effect to its interpretation of the amendments, the fourth circuit read into the Act the notion of "point of rest", a point shoreward of which the handling of cargo would cease to be covered by the Act.

A divided second circuit panel has rejected altogether the fourth circuit's point of rest approach. *Pittston Stevedoring Corp.* v. *Dellaventura*, Nos. 76-4042,-4009,-4043-4249 (July 1, 1976) (Friendly, J.) In *Pittston*, one of the employees was a "checker" who, like Stockman, was stripping a container of goods destined to different consignees at a waterfront area remote from where the ship had been unloaded. The court held that stripping was the "functional equivalent" of sorting cargo discharged from a ship, and was covered by the Act.

From the present judicial melange [3] can be gathered the truth of Judge Friendly's remark:

> "Given the importance of the question, the number of courts of appeals endeavoring to find an answer, and the divergence of opinion already manifested, it seems unlikely that the opinion of any court of appeals will be the last word to be said." Slip op. at 4683.

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[3] The ninth circuit has also recently interpreted the coverage provisions of the Act, though on facts so different (longshoremen were not involved) as to make the decision of little relevance here. *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957 (9th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3645 (U.S. May 6, 1976) (No. 75-1620). The court emphasized that for an employee to be eligible, his own work and employment must have a "realistically significant relationship" to traditional maritime activity.

IV

Before expressing our views on the merits, we turn to several preliminaries. First, we consider whether in deciding the scope and coverage of the Act, we should give weight to the presumption stated in § 920 that "the claim comes within the provisions of this chapter". We think not. This provision relieves an injured employee from a perhaps bothersome burden in cases where coverage is uncontested, and it may well denote a policy favoring coverage in close cases; but we do not think it bears on the decision before us calling for a general construction of "whether Congress placed the line at the 'point of rest' or much further landward". *Pittston*, *supra*, at 4703-04. This basic interpretative decision must precede any application of the presumption.

Second, we do not see the decision before us as one where we owe a special deference to the decision of the Board (and of the Administrative Law Judge, whose views were seemingly carried forward in the Board's shorter opinion). Judge Craven, dissenting in *I.T.O.*, *supra*, 529 F.2d at 1091, quoted the Supreme Court in *NLRB* v. *Boeing*, 412 U.S. 67, 75 (1973), to the effect that "[a] consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference by the courts." Under § 939 the Secretary is directed to administer the Act and to make necessary rules and regulations, and under § 921 (1976 Supp.) the Benefits Review Board, with members appointed by the Secretary, is charged with determining appeals subject to review by courts of appeal. Judge Craven concluded that the Board, in "an unbroken line of decisions", has consistently and reasonably interpreted the coverage provisions found in the 1972 amendments, and that this interpretation should be accorded " 'great weight' " by a court. 529 F.2d at 1092.

But while the Board's views are obviously to be regarded with interest and respect, we do not think we are justified in a case of this character in subordinating our own judgment. Professor Davis' discussion is particularly helpful in considering how much deference a court ought to accord to agency determinations. 4 Davis, Administrative Law Treatise § 30.09 et seq. He suggests three criteria: (1) the relative expertise of agency and court; (2) whether there is express statutory delegation of a question to the agency; and (3) whether the problem involves general propositions or the application of such propositions to specific facts.

The first criterion, the expertise of the court relative to that of the agency, depends in turn upon the nature of the question to be decided. Here the Secretary of Labor and the Board may know more about the technical aspects of work on the waterfront, the needs of workers, and the labor management issues intertwined with the Act, but they have no greater expertise than a court in construing statutes, judicial decisions and legislative history, and the latter is the paramount task before us.

The second criterion is the extent to which Congress may have expressly entrusted the question to the agency rather than to a court. Here Congress entrusted to the Secretary the daily administration of the Act, but created an independent Benefits Review Board to determine appeals "raising a substantial question of law or fact" from initial orders, § 921(b)(3) (1976 Supp.), with ultimate review in the courts of appeal. From this structure, we can doubtless infer an intention to grant to the Board, subject to court review, a substantial oversight of questions of law and policy affecting the distribution of benefits in a particular case. Still, we agree with Judge Friendly that the Board is less a policy-making and more an "umpiring" body than is true of agencies such as the National Labor Relations Board, *see Pittston*, *supra*, at

4706, while the Secretary's own discretion, being subordinate in the legal area to that of the Board, is even more limited. In sum, while on occasion we may well expect to defer to the Secretary or the Board in particular applications, we see neither the Board nor the Secretary as having been commissioned to settle the sort of question, involving the general construction of an act of Congress, encountered here.

As Davis points out in presenting his third and final criterion, a distinction exists "between enunciation of general propositions or methods of approach and the mere application of such propositions or methods to unique facts." § 30.11, at 253. A question such as whether the Act is to be interpreted to cover all workers in the loading or unloading process, defined broadly, or only those immediately associated with taking the cargo on or off a certain vessel, is the kind of "general proposition" on which courts must provide their own judgment. *Id.* at 254.

This is not to overlook our duty to accept the Board's factual findings when supported by substantial evidence. *Pittston*, *supra*, at 4704. Although not expressly stated in the Act, *compare* § 921(b)(3) (requiring the Board to accept the supported findings of the Administrative Law Judge), we readily assume the existence of such a duty. Still the material facts are not in dispute, and as the focus is upon the meaning of the statute, the judgment must be our own, not the Board's.

V

Proceeding, then, to our own assessment of Stockman's status under the current Act, it is useful first to consider the prior law and the changes brought about by the 1972 amendments. Compensation was previously payable only if disability or death resulted from injury occurring upon "navigable waters" including "any dry

dock". Recovery was expressly forbidden if recovery could be validly provided under state workmen's compensation laws. The Supreme Court accordingly interpreted the earlier Act to reimburse only injuries seaward of the pier, e.g. on shipboard or other like structure within the narrow confines of the admiralty tort jurisdiction. *Nacirema Co.* v. *Johnson*, 396 U.S. 212 (1969) (no coverage under the Act for injuries to longshoremen occurring on a pier affixed to land); *cf. Victory Carriers, Inc.* v. *Law*, 404 U.S. 202 (1971). Thus before the amendments, the Act was regarded as a rather limited supplement to state workmen's compensation laws,[4] designed not to supersede or improve upon those laws but to fill a gap which the states were without jurisdiction to fill. *Cf. Washington* v. *Dawson & Co.*, 264 U.S. 219 (1924); *State Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263 (1922); *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917).

An anomaly was then created by this narrow reliance on location or "situs" to delineate the limits of coverage—the same longshoreman who could recover if injured while working on board a ship could not recover if injured a few feet away from the ship on a pier. In *Nacirema* the Court recognized and discussed this seeming

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[4] During the pre-1972 period, longshoremen and harbor-workers injured on shipboard (or on land by a ship's appurtenance) could sue the vessel for unseaworthiness as well as for negligence, achieving, in some instances, recoveries far beyond anything available under the Act. *Guttierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206 (1963); *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946). The 1972 amendments eliminated the unseaworthiness remedy for longshoremen and harborworkers while greatly increasing the benefits payable under the Act and by enlarging its scope to include injuries on piers and terminals adjoining navigable waters. The amendments also removed the express exclusion for injuries which would be covered under state workmen's compensation laws.

unfairness but felt there was little to be done.[5] It discussed the matter in terms of "situs" and "status", terms used by the Administrative Law Judge in the present case (Stockman's injury was said to have occurred within the "situs" provisions of the Act and his employment to meet the "status" provisions). The Court said that it was being urged to extend coverage on the basis of the "status" of longshoremen employed in performing a maritime contract, 396 U.S. at 215, but declined to do so, reading the Act as determining coverage exclusively by the "situs" of the injury. The Court went on to state,

> "Congress might have extended coverage to all longshoremen by exercising its power over maritime contracts. 7 [7. The admiralty jurisdiction in tort was traditionally 'bounded by locality,' encompassing all torts that took place on navigable waters. By contrast, admiralty contract jurisdiction 'extends over all contracts, (wheresoever they may be made or executed . . .) which relate to the navigation, business or commerce of the sea.' Since a workmen's compensation act combines elements of both tort and contract, Congress need not have tested coverage by locality alone. As the text indicates however, the history of the Act shows that Congress did indeed do just that.] But the language of the Act is to the contrary and the background of the statute leaves little doubt that Congress' concern in providing compensation was a narrower one." [Citations omitted.]

396 U.S. at 215-16.

Against this background, Congress enacted the 1972 amendments. With respect to "situs", it clearly shut the door on any continued interpretation of the Act's boundaries as being coextensive with the boundaries of admiralty tort jurisdiction. While disability or death must still result from an injury occurring upon the "navigable waters of the United States", these are now defined to include shoreside structures such as a pier, terminal, or "other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel". Such facilities, not ordinarily considered to be "navigable waters", have always been outside the exclusive federal admiralty tort jurisdiction. They are areas where the authority of the United States to enact compensation laws for maritime workers overlaps state authority to enact workmen's compensation laws.[6]

Doubtless in part because of this overlap, Congress did not limit its changes in 1972 to a widening of the "situs" requirement. For the first time, it undertook to define the class of persons covered by inserting an inclusive definition of "employee", § 902(3). Thus while "status", as distinct from "situs", was formerly of minor importance, *cf. Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334 (1953), it has become a matter of considerable significance. Only an "employee" is covered, defined as "any person engaged in maritime employment, including any longshoreman or other person engaged in

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[5] The Court said in *Nacirema*,

> "There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension of Admiralty Jurisdiction] Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act."

396 U.S. at 223. The Court concluded that while Congress could draw whatever line it chose, "the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court." 396 U.S. at 224.

[6] As indicated in the text, the Supreme Court went to some length in *Nacirema* to indicate that Congress had power to extend federal workmen's compensation laws for those in maritime employment shoreward, into areas outside the exclusive admiralty tort jurisdiction.

longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . ." § 902(3).

VI

In the present case, we hold that the situs requirement of § 903(a) was plainly met, in spite of the distance separating Berth 5 of the Boston Army Base from the Sea-Land berth at Castle Island. Appellants' only substantial argument is their challenge to Stockman's status as a member of the covered class under § 902(3).[1]

On the question of situs, the simple fact is that the amended Act defines navigable waters to include "any adjoining pier, wharf, . . . terminal, . . . or other adjoining area customarily used by an employer in loading [or] unloading . . . a vessel". § 903(a). "Adjoining" can only refer to navigable waters; and Stockman was, as even Clark concedes, working at a terminal which adjoined navigable waters. To be sure, the final reference to "other adjoining area customarily used by an employer in loading [or] unloading . . . a vessel", as well as other parts of the statute, suggests that Congress had in mind a terminal associated with the shipboard movement of marine cargoes. But we do not think Congress meant necessarily to limit "adjoining" to only those areas directly adjoining the berth of the specific vessel being unloaded. The terminal here in question is at a location which is customarily used in loading and unloading ves-

[1] Stockman contends that since appellants did not initially shape their argument before us in terms of status, but rather urged that the Army Base facility not being contiguous with Sea-Land's Castle Island berth, was outside the situs provision, we should decline to consider the issue of status. But status was considered both by the Administrative Law Judge and by the Board, and we think no purpose is served in bifurcating the issues at this stage, the ultimate question being one of construing the statute as a whole. In a reply brief, appellants have belatedly briefed the status issue.

sels. Some vessels do, in fact, lie there for loading and unloading. Moreover, the area is several hundred yards directly across open water from the berth of Sea-Land's container vessels and is generally part of the same Boston waterfront area. We are not faced with the stripping of a container at an inland freight depot having only some incidental connection with navigable waters. We therefore conclude, from all these factors, that the situs requirement of § 903(a) has been met.

We thus return to what we regard as the only issue on which appellants could prevail, whether Stockman was engaged in "maritime employment" within § 902(3). We agree generally with Judge Winter, writing for the majority in *I.T.O.*, *supra*, 529 F.2d at 1084-85, that the terms "maritime employment", "longshoreman" and "longshoring operations" in § 902(3) do not have any such settled meaning that we should decide the case without resort to the legislative history.

We start with the obvious fact that the Act and the relevant House and Senate Reports speak repeatedly of longshoremen, indicating, if it could be doubted, that they are a prime class of employee intended to be benefited. Stockman, the parties stipulated, is a "longshoreman"; he belongs to the ILA; and he works at a waterfront terminal for a stevedore and terminal operator whose chief activity appears to be the handling of shipborne cargo. Clark was under contract to "unload [Sea-Land] vessels as they come into port [and] discharge the containers", and it was in connection with this latter operation that Stockman was injured.

Still, as the second circuit points out, "it is not enough that a claimant calls himself a longshoreman or that a longshoreman's union in a particular port has forced employers to hire its members for such unlongshoremen-like positions as clerks or guards." *Pittston*, *supra*, at

4712. To be sure, stuffing and stripping containers is much closer to conventional longshore activity than clerking or guarding, though the analogy is not total because the containers, once landed, are transformed into trailers. The contract between the ILA and the Boston Shipping Association, in evidence here, reflects a negotiated undertaking to use only longshore labor to strip and stuff containers, and to do so exclusively at waterfront facilities. Doubtless the union insisted upon such a provision because otherwise containers could be driven to most any location and discharged there by non-waterfront labor. And its insistence upon the use of longshore labor was not totally arbitrary. Containerization greatly simplifies and speeds up the actual loading and unloading of the ship itself, cutting down the workforce needed for those operations. Much of the loading and unloading that used to take place on or alongside the ship is presumably now reflected in the stuffing and stripping of containers. From the longshoremen's point of view this is "traditional" work, and, as further discussed below, there is much to support their position.

But while such considerations indicate that stuffing and stripping—unlike clerking and guarding—cannot be dismissed as beyond the reasonable purview of longshore work, they do not tell us what coverage Congress had in mind. Before proceeding further, we set forth the relevant passages from the House Report:

"Extension of Coverage to Shoreside Areas

"The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur 'upon the navigable waters of the United States.' Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury

depending on which side of the water's edge and in which State the accident occurs.

"To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages. . . .

. . .

"It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

"The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

"The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters."

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess.

Two other courts of appeals have already interpreted the Act in light of these passages, coming to quite different conclusions. Judge Winter, writing in *I.T.O.* for the fourth circuit, read the committee reports as limiting coverage to those engaged in the immediate loading and

unloading of ships, particularly in view of the stated intent of the committees to achieve uniform compensation of employees who would otherwise be covered for part of their activity. The fourth circuit then went on to limit coverage to injuries occurring between the first dockside holding area and the ship.[8]

The second circuit, to the contrary, emphasizing the committee's concern for a "uniform compensation system", read the legislative reports as manifesting an intention to cover, rather more broadly, those taking part at the designated sites in the complex process of loading or unloading a vessel, though it rejected (as do we) one commentary's shotgun approach that "all employment related injuries which occur within the Act's territorial limits" be covered. G. Gilmore & C. Black, Law of Admiralty § 6-51, at 430 (3d ed. 1975), *quoted in Pitston, supra*, at 4719-20 & n. 27. In refusing to follow the fourth circuit, the second circuit made much of the fact that "employee" under the Act includes "any longshoreman" as well as "other person engaged in longshoring operations". Thus "[a] 'longshoreman' may . . . be covered at some times even when he is not engaged in traditional longshoring activity." *Id.* at 4712. We agree with Judge Friendly that, whatever the workers covered, a claimant's status need not depend wholly on the job being performed at the very moment of injury.

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[8] Judge Winter acknowledged that the point of rest rule so formulated might result in coverage for a longshoreman working exclusively on shore between the point of rest and the ship. While such a shorebound worker would never have been covered under the old Act, Judge Winter felt that coverage could be inferred from the committee language as a whole and the liberality of construction to be afforded remedial legislation of this type. *I.T.O., supra*, at 1088. Inexplicably, Judge Winter did not discuss the opposite side of the coin: the failure of a point of rest rule to cover a longshoreman who works part of the time on vessels but whose injury occurs while he is working at a covered situs shoreward of the point of rest.

It seems clear that, however construed, the House Committee Report, and the similar Senate Committee Report, Sen. Rep. No. 92-1125, 92d Cong. 2d Sess., go only part way towards clarifying the application of the 1972 amendments in the present situation. None of the mentioned examples refer to someone like Stockman. Stockman is plainly not an employee "whose responsibility is only to pick up stored cargo for further transshipment"; nor do we think that hauling the trailer from the Sea-Land berth to the Boston Army Base for stripping can be viewed as picking up stored cargo for transshipment. Indeed, Congress has seemingly gone out of its way to avoid taking any express stance on the status of those engaged in stuffing and stripping containers as part of the loading and unloading process just as it is silent on the status of other terminal employees engaged in moving, storing and culling cargo on the pier. Still, while scarcely explicit, the legislative reports do convey several relevant messages:

1. The amendments are to be construed to achieve a "uniform compensation system" which does not depend on the "fortuitous circumstance of whether the injury [to the longshoreman] occurred on land or over water".

2. The amendments are to afford coverage to employees, or possibly classes of employees, who would otherwise have been covered for part of their activity by the the earlier Act.

3. One of the reasons for affording coverage on land is that "with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore".

Attempting to reconcile these notions, we are not satisfied with the "point of rest" theory advanced by the fourth circuit. To be sure, the committee reports state that coverage is for employees who formerly would have

been covered for part of their activity, in other words those whose duties require their part-time presence on shipboard (as there would be no coverage under the old Act for purely landbased workers). But we see nothing to suggest that Congress meant, for example, to exclude from benefits a steadily employed longshoreman whose duties periodically took him aboard ship but who, at the time of injury, was engaged in moving terminal cargo shoreward of the point of rest. The fourth circuit's view would create, in effect, a further and more narrow situs requirement than that in the Act. *See* Judge Craven's dissent in *I.T.O. supra*, at 1096-97. Whether the status of at least a steady employee is that of a "maritime" worker, including "longshoreman", seems to us to require looking at the nature of his regularly assigned duties as a whole.

We would further comment that the fourth circuit view does not seem compatible with the "uniformity" of coverage Congress was seeking. The evil of the old Act was that it bifurcated coverage for essentially the same employment. The point of rest approach would seem to result in the same sort of bifurcation, since the same employee engaged in an activity beyond the point of rest would cease to be covered. This is not to say that Congress might not have focused the generous benefits of the Act on direct loading and unloading activities to the exclusion of others. These are at the heart of the longshoreman's traditional work and may be more dangerous.[9] But Congress expressly included "terminal" in

[9] There is no distinction made in the committee reports based on the dangerousness of the work performed. The reports do reflect a belief that state workmen's compensation payments are typically inadequate—not just, it seems, for longshoremen but for workers generally. In the sense that the 1972 Amendments are intended to provide a more adequate level of coverage, they are "remedial" and entitled, like the Act orginally, to be "liberally construed in conformance with its purpose . . . ." *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953).

the situs provisions of the Act, and we think that if a bifurcation of this sort were intended, the Act, or at least the legislative history, would have pointed to it explicitly. We therefore reject the fourth circuit's point of rest analysis.

We are more persuaded by the reasoning of the second circuit in *Pittston*, which held as follows:

> "We therefore hold that the [1972] Amendments at least cover all persons meeting the situs requirements (1) who are engaged in stripping or stuffing containers or (2) are engaged in the handling of cargo up to the point where the consignee had actually begun its movement from the pier (or in the case of loading, from the time when the consignee had stopped his vehicle at the pier), provided in the latter instances that the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel."

Slip op. at 4719. In order to arrive at (1), the *Pittston* court laid heavy stress on the specific mention in the committee reports of "the advent of modern cargo-handling techniques, such as containerization" and on the committees' recognition that this caused more of the longshoreman's work to be performed on land. It also noted the committees' sanction for coverage of "checkers" (who check the contents of containers against bills of lading) without limitation as to where the checking would be done. The court said,

> "Stripping a container of goods destined to different consignees is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship . . . . Congress intended to cover men engaged in these activities if they met the situs test contained in the Act—irrespective of the employee's position vis-a-vis a 'point of rest.' . . . One answer to petitioners' argument

> that stuffing or stripping a container on a pier is no different from doing the same job a mile away is that Congress may have doubted its power, under the admiralty clause of Article III, to go further than it did. . . . We fail to perceive any significant difference because, for the convenience of someone, it [the container] had been moved to another pier. The cargo had not yet been delivered to the consignee; the unloading process still had not been completed." [Footnote deleted.]

Slip op. at 4714.

Except in one respect, discussed later, we find Judge Friendly's analysis with respect to handling the contents of containers not only persuasive but compelling. The historical work of longshoremen was said to be, "in connection with unloading cargo, the breaking up of drafts and pallets, sorting the cargo according to its consignees and delivering it to the trucks or other carriers." *Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n*, 426 F.2d 884, 886 (2d Cir. 1970). This conforms to the usual obligation of the ship "[t]o unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee, and afford the consignee a reasonable opportunity to come and get it." *American Presidential Lines, Ltd.* v. *Federal Maritime Board*, 317 F.2d 887, 888 (D.C. Cir. 1962).

If a container is discharged from a vessel containing goods for a number of consignees neither the shipowner nor the longshoremen will have completed their work until the container is stripped and the cargo sorted so as to be accessible to the consignees. We agree with Judge Friendly that it can make little difference with respect to the longshoreman's activity whether the stripping and sorting is done where the container first comes to rest on the pier or shoreward of that point. If there

is a relevant difference, Congress has not mentioned it. The committees do emphasize that coverage is not intended for employees "who are not engaged in loading [or] unloading . . . a vessel"; but it seems both reasonable and consistent with existing practice, to view the unloading process as not yet complete so long as unsorted goods destined for various consignees remain inside the original container within which they were shipped, even though the containers have already been removed from the hold of the vessel. On this premise, one stripping a container retains the status of a "longshoreman" and is "engaged in longshoring operations".

The most troublesome question, as we see it, is reconciling this view with the statement in the committee reports that the compensation system of the Act is to apply to employees who would otherwise be covered for part of their activity. That statement, as well as other parts of the committee reports, indicates that Congress, in moving shoreward, did not see itself as including under the Act whole new groups and classes of employees. Coverage was still to be geared only to persons who loaded and unloaded vessels (or else repaired or built them) and who fit such traditional maritime designations as longshoreman, harborworker, and the like. Thus, as indicated previously, we quite agree with the second circuit that clerks and other like terminal workers are excluded.

The problem is whether those performing longshoring operations, like Stockman, are also to be excluded unless they can demonstrate that part of their normal duties requires them to go aboard a ship—or, as Judge Friendly said (with respect to "cargo handlers", but not strippers or stuffers), unless "the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel". *Pittston*, *supra*, at 4719.

We conclude, however, in accord with the second circuit, that there is no need for such a showing in the

case of persons employed, like Stockman, in the stripping of containers containing unsorted cargo, destined for several consignees, at a location within the situs requirement. Such an individual, like a longshoreman working on the pier alongside a ship during unloading operations, is a longshoreman within § 902(3). Whatever the language of the committee reports, the statute itself calls for no additional showing once that status has been firmly established. It is clear, as indeed Judge Winter recognizes, *I.T.O. supra*, at 1088, that even longshoring work in its traditional form is at times organized so that some workers remain at all times on the pier as part of a continuous loading or unloading process. *See Garrett* v. *Gutzeit O/Y*, 491 F.2d 228 (4th Cir. 1974). Plainly such men are no less longshoremen than their brethren on the vessel. While Congress did not mean in the 1972 amendments to cover new classes of employees not heretofore covered in part, we do not believe it meant to exclude from coverage those particular members of a covered group, e.g. longshoremen, whose individual duties do not happen to take them on shipboard. We read the language of the committee reports as requiring bona fide membership in a class of employees whose members would for the most part have been covered some of the time under the earlier Act—not necessarily a demonstration by each claimant that he individually would have been covered.

This is not to say that workers who are not plainly longshoremen, or otherwise plainly included in some recognized category of maritime employment, may not have to demonstrate their entitlement to coverage by showing that their duties encompass shipboard activity. Something like this thinking doubtless accounts for clause (2) of the second circuit's formulation, relating to "cargo handlers" as distinct from those stuffing or stripping containers. We expressly do not decide this matter now.

since it is not before us. We hold only that an employee like Stockman, being a longshoreman and engaging in longshoring operations, comes within the status requirement of the Act.

Affirmed. Costs for appellees.

Nos. 76-569 and 76-570

In the Supreme Court of the United States

OCTOBER TERM, 1976

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v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A79-A96)[1] is reported at 537 F. 2d 706. The decision and order of the National Labor Relations Board (Pet. App. A58-A78) and the decision of the administrative law judge (Pet. App. A1-A57) are reported at 221 NLRB No. 144.

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[1] "Pet. App." refers to the separate joint appendix to the petitions.

JURISDICTION

Following denial of a petition for rehearing on August 6, 1976 (Pet. App. A97-A98), the judgment of the court of appeals (Pet. App. A99-A100) was entered on September 9, 1976. The petitions for a writ of certiorari were filed on October 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that certain provisions in the collective bargaining agreement between petitioners were designed to enlarge work opportunities for employees in the unit rather than to preserve or reclaim the work of that unit, and thus violated Section 8(e) of the National Labor Relations Act.

2. Whether the Board properly found that petitioner in No. 76-570 violated Section 8(b)(4)(B) of the Act by enforcing the provisions.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*, are set forth at pages 3-4 of the petitions.

STATEMENT

A. *Background*

Petitioner New York Shipping Association, Inc. (NYSA) is an association of steamship lines carrying cargo and passengers into and out of the Port of New York, and of stevedore contractors employing longshoremen to load and unload ships in that port. NYSA bargains on behalf of its members with petitioner International Longshoremen's Association (ILA), the bargaining representative

of the longshoremen and related craftsmen whose traditional and principal work has been to load and unload in the Port of New York ships belonging to NYSA members.[2]

Before World War II most solid cargo moving over the New York docks was handled on a piece-by-piece basis by longshoremen represented by ILA. Truckers delivered loose cargo to the pier and removed it from their vehicles, and longshoremen then placed the cargo on drafts or pallets, or into small boxes, before loading it aboard ship. Cargo from incoming ships was broken down by longshoremen and picked up at the pier for delivery to the ultimate consignee.

In the late 1940's and early 1950's the practice began of stuffing loose cargo into 8-foot long wooden boxes (called Dravo containers) and 20-foot long metal containers for shipment to and from Puerto Rico. During this period less-than-container-load (LCL) and less-than-trailer-load (LTC) cargo received by Valencia-Baxt Express, Inc. (Valencia) was consolidated into these types of

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[2]The findings of fact of the administrative law judge (Pet. App. A2-A35) are based upon a stipulation, which incorporates the records of two injunction proceedings brought against NYSA and ILA under Section 10(*l*) of the Act, 29 U.S.C. 160(*l*) (*Balicer* v. *International Longshoremen's Ass'n, AFL-CIO and New York Shipping Ass'n*, 364 F. Supp. 205 (D.N.J.), affirmed, 491 F. 2d 748 (C.A. 3), and *Balicer* v. *International Longshoremen's Ass'n, AFL-CIO and New York Shipping Ass'n*, 86 LRRM 2559 (D. N.J.)), and is supplemented by affidavits submitted to the Board (A. 53a-60a). ("A." designates the appendix in the court of appeals.) The Board did not disturb the findings of fact, and there is no factual dispute here. See NYSA Pet. 4. Separate citations to the record have been omitted except where this statement refers to facts not mentioned by the administrative law judge or the Board.

containers by Valencia's employees at its off-pier facility (A. 102a, 105a, 794a).[3] The containers then were trucked by Valencia's employees to the pier and placed directly aboard ship by longshoremen. During the same period, when necessary to perform their traditional and principal loading and unloading work, longshoremen also stuffed and stripped boxes and containers on the piers; they did so, however, only with respect to cargo sent directly to the pier in loose or bulk form by the steamship lines' customers (A. 845a, 848a).

Consolidated and Twin are non-vessel-owning common carriers or freight "consolidators" that operate off-pier consolidation facilities located within 50 miles of the Port of New York. Their employees, who are represented by different locals of the Teamsters Union, consolidate LCL and LTL cargo that has been sent to their facilities by customer-consignors for shipment in containers between New York and Puerto Rico. The cargo is stacked or "stuffed" into 40-foot long containers or trailers supplied to the consolidators by the NYSA-member steamship companies serving Puerto Rico.[4] The full containers are trucked several miles from the off-pier facility to the pierside area of the NYSA-member steamship line, where ILA-represented longshoremen load the containers onto the ships bound for Puerto Rico. When a ship arrives in New York

[3] In 1965 Consolidated Express, Inc. (Consolidated), one of the charging parties before the Board, succeeded to the off-pier consolidation operations begun by Valencia in 1949 (Pet. App. A24-A25); Twin Express, Inc. (Twin), the other charging party before the Board, entered the consolidation business in 1967 (*id.* at A29-A31).

[4] These are Sea-Land Service, Inc. (Sea-Land), Seatrain Lines, Inc. (Seatrain), and Transamerican Trailer Transport, Inc. (TTT). Because their container ships can carry only certain kinds of specially-designed containers or trailers, these ship lines furnish the empty receptacles to Consolidated and Twin (A. 728a).

from Puerto Rico, the incoming container is unloaded from the vessel by longshoremen and then trucked by the consolidator's employee to its off-pier facility. There the cargo is removed or "stripped" from the container, separated, and then delivered to the ultimate consignee.

In 1959, after a strike protesting the increased use of large containers in the Puerto Rico trade, ILA and NYSA agreed that ILA would not restrict the handling of any type of container by NYSA-member steamship lines or stevedores, including consolidator-stuffed LCL and LTL containers. NYSA agreed, in turn, to pay a royalty on containers stuffed or stripped away from the pier by non-ILA labor. NYSA also agreed that ILA labor would perform all container work done by NYSA members for their own account, whether performed at the pier or by NYSA members' subcontractors.[5] For 14 years (from 1959 to 1973) ILA-represented longshoremen usually loaded containers directly aboard ship without rehandling at pierside the already-consolidated LCL or LTL cargo. The only exceptions occurred during labor disputes between contracts (Pet. App. A62-A63).

B. *The 1969 Rules on Containers, as Supplemented in 1973*

In 1967 ILA demanded that its longshoremen stuff and strip *all* containers crossing the piers. In February 1969, after a lengthy strike, detailed provisions governing containerization—the "Rules on Containers"—were agreed upon, and since then have appeared, as modified, in every NYSA-ILA contract. The Rules on Containers established a system under which ILA-represented longshoremen working at the piers were to strip and restuff all LCL

[5] The 1959 agreement provided that "Any employer shall have the right to use any and all types of containers without restriction or stripping by the union" (A. 208a-209a). See Pet. App. A62.

and LTL cargo in containers owned or leased by NYSA members and originating within 50 miles of the Port of New York—even if the containers already had been stuffed off the pier by consolidators and thus were ready for immediate loading. If the steamship line failed to have its longshoremen perform such work, the line was required to pay liquidated damages into the Container Royalty Fund.[6]

Between 1969 and early 1973, despite the Rules on Containers, containers stuffed by Consolidated and Twin continued to be loaded on vessels without being stripped and restuffed by ILA-represented longshoremen (Pet. App. A28-A29, A30). In early January 1973, however, ILA and CONASA[7] executed the "Dublin Supplement" to the Rules. The Dublin Supplement provided that LCL and LTL consolidation work formerly performed off-pier by non-ILA labor now must be performed on-pier by ILA labor.[8] Under the Dublin Supplement all consolidated LCL and LTL cargo outbound from New York must be stripped from the consolidator's container and restuffed, at the steamship line's expense, by ILA labor at the pier, or liquidated damages must be paid. To prevent evasion of this rule, steamship lines are forbidden to supply empty containers to off-pier consolidators who attempt to operate as they had in the past. All inbound containers received in New York must be stripped by ILA labor at the pier.

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[6]The relevant portions of the Rules on Containers are set out at Pet. App. A19-A21.

[7]In 1970 NYSA joined the Council of North American Shipping Associations (CONASA), an association representing shipping associations operating from Massachusetts to Virginia. Since then CONASA has bargained with ILA over certain issues, including containerization.

[8]The relevant portions of the Dublin Supplement are set out at Pet. App. A22-A23.

In March 1973 Sea-Land and Seatrain stopped supplying empty containers to Consolidated and Twin, and TTT followed suit in April 1973. The three steamship lines were assessed a total of approximately $230,000 in liquidated damages (A. 882a) for violations of the Dublin Supplement occurring before then. On April 13, 1973, NYSA and ILA issued a joint notice to all NYSA members, announcing that steamship lines had been assessed liquidated damages for violating the Rules with respect to containers stuffed or stripped at the premises of 14 named consolidators, including Consolidated and Twin (Pet. App. A66).

C. *The Decisions Below*

The Board concluded that both petitioners violated Section 8(e) of the Act by maintaining and enforcing the Rules on Containers and the Dublin Supplement, and that petitioner ILA violated Section 8(b)(4)(B) of the Act by threatening to assess and assessing liquidated damages against Sea-Land, Seatrain, and TTT with an object of forcing them to cease doing business with Consolidated and Twin (Pet. App. A73), and it entered an appropriate remedial order (Pet. App. A74-A78). The Board acknowledged that genuine work preservation is protected primary activity (*id.* at A67-A68), but it found that petitioners were not attempting to preserve or reclaim work for the NYSA-ILA unit, but rather were seeking to enlarge the work opportunities for employees in that unit.

The Board concluded (Pet. App. A69) that "the on-pier stripping and stuffing work performed by longshoremen as an incident of loading and unloading ships does not embrace the work traditionally performed by Consolidated and Twin at their own off-pier premises." It explained (*ibid.*; footnote omitted):

The traditional work of the longshoremen represented by ILA has been to load and unload ships. When necessary to perform their loading and unloading work, longshoremen have been required to stuff and strip containers on the piers.

Similarly, for many years, maritime cargo has been sorted and consolidated off the docks by companies employing teamsters and unrepresented employees. With the advent of vessels designed exclusively to carry the large containers presently in use, these consolidating companies, such as Consolidated and Twin, have continued to consolidate shipments into containers prior to their placement aboard the vessels. The consolidators generate such work themselves, performing it not on behalf of the employer-members of NYSA but for their own customers who have goods to ship. Furthermore, they perform this consolidation work at their own off-pier premises, with their own employees who are outside the unit represented by ILA, and who fall within the coverage of separate collective bargaining agreements, under which they are represented by other labor organizations.

A divided court of appeals enforced the Board's order. It concluded that the Board stated "the essence of the matter clearly, succinctly, and correctly" (Pet. App. A89) and that its decision "is supported by substantial evidence and by sound analysis" (*id.* at A91).

ARGUMENT

1. *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, 386 U.S. 612, held that whether an agreement restricting business relations between two persons violates Section 8(e) of the National Labor Relations Act depends upon "whether, under all

the surrounding circumstances, the Union's objective was preservation of work for [the unit] employees, or whether the agreements * * * were tactically calculated to satisfy union objectives elsewhere" (386 U.S. at 644; footnote omitted). If the agreement has the former objective, it is primary and lawful; if it has the latter objective, it is secondary and unlawful.

Unions and employers therefore lawfully may agree that work normally performed or "fairly claimable" by employees in the bargaining unit will be performed only by unit members; such provisions have the valid, primary purpose of protecting the jobs of the employees in that unit. *Meat and Highway Drivers, Local 710* v. *National Labor Relations Board*, 335 F. 2d 709, 713 (C.A.D.C.). On the other hand, they may not agree to acquire for the employees of the primary employer work that is " 'neither unit work nor fairly claimable as unit work' " (*Sheet Metal Workers, Local 223* v. *National Labor Relations Board*, 498 F. 2d 687, 696 (C.A.D.C.)).[9] Such agreements are unlawful because they reach beyond the primary bargaining unit to acquire work historically performed by employees of another employer in another work unit.

The basic question presented by the petitions is whether the Board properly concluded that the Rules on Containers, as modified by the Dublin Supplement, sought to enlarge the work opportunities for the NYSA-ILA bargaining unit, rather than merely to preserve the pierside container work traditionally performed by employees in that unit. Such an issue, involving only the

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[9]See *National Woodwork*, *supra*, 386 U.S. at 648 (Harlan, J., concurring): "[this is] not a case of a union seeking to restrict by contract or boycott an employer with respect to the products he uses, for the purpose of acquiring for its members work that had not previously been theirs."

application of settled principles to the particular facts of this case, does not warrant review by this Court. The decision of the court of appeals sustaining the Board's resolution of this issue is in accord with that of the District of Columbia Circuit in *Pacific Maritime Association* v. *National Labor Relations Board*, 515 F. 2d 1018, certiorari denied, 424 U.S. 942, sustaining the Board's evaluation of the similar container rules for West Coast ports at issue in *International Longshoremen's and Warehousemen's Union (California Cartage Co.)*, 208 NLRB 994.[10] There is no more reason for this Court to grant review in the instant case than there was in *Pacific Maritime*.

In making its assessment the Board properly concentrated on the work done in the past at off-pier premises. The Board analyzed the ILA members' historical work functions and found that they did not include the work performed by the off-pier consolidators. They performed, rather, functions for the convenience of shippers who did not otherwise consolidate their shipments. By arguing that ILA members performed some broader function, petitioners are taking issue with the inferences the Board drew from the facts. Such an issue does not warrant this Court's review where, as here, the court of appeals has concluded that the Board's finding was supported by substantial evidence. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

The conclusion of the court of appeals is correct. The traditional work of longshoremen represented by ILA has been to load and unload ships. To the extent they

[10]Petitioners' argument (NYSA Pet. 12, ILA Pet. 13) that the District of Columbia Circuit would have decided the instant case differently is incorrect, as *Pacific Maritime* demonstrates.

have filled or emptied containers at the docks, that work has been performed as an incident to their primary functions; traditionally stuffing and stripping has been performed by ILA members only for customers of the steamship lines who sent their LCL and LTL cargo in loose or bulk form directly to the docks. At the same time, off-pier consolidators traditionally have filled and emptied containers at their own premises, using employees represented by other labor organizations. These consolidators have generated that work themselves, performing it for their own customers who have goods to ship.

Petitioners say that ILA workers regularly stuffed and stripped containers; that is both the beginning and the end of their argument that the work at issue in this case is traditionally theirs. They overlook that there may be—as the Board found there were—two distinct "stuffing and stripping" markets: one for the convenience of steamship companies that must consolidate loose cargo sent to them by shippers, and one for the convenience of shippers who consolidate their cargo in other ways. It is neither contradictory nor unrealistic to conclude, as the Board did, that ILA workers traditionally have performed the stuffing and stripping required for the convenience of steamship companies, but have not traditionally performed other stuffing and stripping.

For a long time New York has had both on-pier and off-pier stuffing and stripping, and ILA workers traditionally have loaded pre-stuffed containers onto vessels. The question presented here is whether ILA now may demand, and NYSA may agree, that ILA members will perform all stuffing and stripping of LTL and LCL cargo,

even that portion of the work that they had traditionally not performed. The Board was entitled to conclude that they could not.[11]

2. There is no conflict among the circuits on the question presented here.

a. There is no conflict between the instant case and *Intercontinental Container Transport Corp.* v. *New York Shipping Association,* 426 F. 2d 884 (C.A. 2) ("*ICTC*"), upon which petitioners mistakenly rely (NYSA Pet. 15; ILA Pet. 15-16). *ICTC,* like the decision in this case, was decided by the Second Circuit; any inconsistency between the *dicta* in *ICTC* and the holding of the instant case would be for that court to reconcile. *Wisniewski* v. *United States,* 353 U.S. 901, 902.

In any event, the cases are readily distinguishable. In *ICTC* the plaintiff, an off-pier consolidator of LCL and LTL cargo that employed ILA labor, complained that NYSA and ILA had violated the antitrust laws by combining and conspiring to exclude it from membership in NYSA. The plaintiff did not argue that the Rules

[11]Petitioners argue (NYSA Pet. 12, ILA Pet. 21-22) that this case is similar to *National Labor Relations Board* v. *Enterprise Association,* No. 75-777, argued October 6, 1976. It is not. In *Enterprise* the Board concluded that the union had sought to preserve traditional unit work, and the only question was whether the union could exert pressure against an employer that had no right to control the disputed work. Here, it is unnecessary to reach the question of the right to control, because the Board found that the work was not traditionally performed by ILA members. The decision in *Enterprise* therefore will not affect the outcome of this case. See *Pacific Maritime Association, supra,* in which the District of Columbia Circuit, which disapproved the Board's decision in *Enterprise,* enforced the Board's order in a case similar to the present one.

on Containers and the Dublin Supplement were an unlawful work acquisition agreement; it argued, instead, that the Rules were used as a device to establish the sort of union-employer anti-competitive conspiracy that violates the Sherman Act.[12] The court of appeals held in *ICTC* only that the district court had erred in granting a preliminary injunction, because plaintiff had not shown that it could establish the requisite anti-competitive conspiracy at trial. As the court stated (426 F. 2d at 888):

> Thus it appears that, far from aiding and abetting a violation of the Sherman Act by a group of business men, the union here, acting solely in its own self-interest, forced reluctant employers to yield to certain of its demands.

Although the court observed in *ICTC* that the Rules on Containers had as their object "the preservation of work traditionally performed by longshoremen covered by the agreement" (*id.* at 887), the issue whether the Rules violated Section 8(e) of the National Labor Relations Act was not before the court, and thus it had no occasion to consider that question (see Pet. App. A82 n. 1).

b. The other cases relied upon by petitioner ILA (ILA Pet. 13-14) also do not conflict with the decision below.[13] In *American Boiler Manufacturers Association* v. *National Labor Relations Board,* 404 F. 2d 547

[12]See *Allen Bradley Co.* v. *Local Union No. 3,* 325 U.S. 797.

[13]Nor is the decision in the instant case inconsistent with *Pittston Stevedoring Corp.* v. *Dellaventura,* C.A. 2, No. 76-4042, decided July 1, 1976, certiorari granted December 6, 1976, *sub nom. Northeast Marine Terminal Co.* v. *Caputo* (No. 76-444) and *International Terminal Operating Co.* v. *Blundo* (No. 76-454), or any other case under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. (1970 ed. and Supp. V) 901 *et seq.* These decisions hold that stuffing and stripping

(C.A. 8), certiorari denied, 398 U.S. 960, the court held that a union could lawfully strike to "reacquire, as well as preserve, [unit] work" (404 F. 2d at 551); it made it clear, however, that its conclusion did not extend to agreements "to acquire work which unit employees had never performed or work which they may have performed in the past but have completely lost before the clause was negotiated" (*id.* at 552). In *Meat and Highway Drivers, Local 710* v. *National Labor Relations Board, supra,* the unit employees historically had performed on an exclusive basis the work sought to be recaptured (335 F. 2d at 712, 714); the NYSA-ILA unit employees involved here have never performed the disputed consolidators' container work. In *Canada Dry Corp.* v. *National Labor Relations Board,* 421 F. 2d 907 (C.A. 6), the disputed work was identical to the traditional work performed by unit employees (*id.* at 909); here ILA workers traditionally have done stuffing and stripping only for the convenience of the steamship line, and not for the convenience of the shipper and freight forwarder. The latter work always has been performed by the consolidators' employees.

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operations, at least when conducted by longshoremen who spend part of their time loading and unloading vessels, are of such a maritime character that they satisfy the "status" test for compensation established by 33 U.S.C. (Supp. V) 902(3). But, as we have indicated in the text, the fact that longshoremen traditionally have performed some stuffing and stripping does not mean that they traditionally have performed *all* stuffing and stripping. Petitioners cannot prevail in this case unless they can establish that they have a claim to all such operations, whereas the claimants in the compensation cases prevailed on a showing that some stuffing and stripping operations are so related to maritime commerce that the Longshoremen's Act applies. Moreover, the tests under the Longshoremen's Act—relationship to maritime commerce and physical location of the work performed—have no similarity to the question presented in this case, which is whether one employee unit rather than another has a traditional claim to perform particular work. It would make no difference under the Longshoremen's Act, whether the ILA-represented unit or some other unit traditionally performed the stuffing and stripping work in question. There is therefore no reason to defer disposition of the instant case ppnding the Court's decision in *Caputo* and *Blundo*.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1976.

DOJ-1976-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-569
No. 76-570

NEW YORK SHIPPING ASSOCIATION, INC.
and
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO, *Petitioners,*
v.
NATIONAL LABOR RELATIONS BOARD, *Respondent,*
and
TWIN EXPRESS, INC.,
CONSOLIDATED EXPRESS, INC.,
and
TRUCK DRIVERS UNION LOCAL 807,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Intervenor-Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR TWIN EXPRESS, INC. IN OPPOSITION

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BRIEF FOR TWIN EXPRESS, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (A79-A96) [1] is reported at 537 F.2d 716. The Board's decision and

[1] References preceded by an "A" are to pages of the 174 page Appendix filed by the Petitioners with this Court. References preceded by a "JA" are to pages of the two-volume joint appendix

order (A58-A78), together with the decision of the Administrative Law Judge (A1-A57), are reported at 221 N.L.R.B. No. 144. The opinion of the District Court (per Judge Lacey) awarding Section 10(1) [2] injunctive relief on behalf of Consolidated Express, Inc. (CEI) is reported at 364 F. Supp. 205 (D.N.J.), aff'd without opinion, 491 F. 2d 748 (3rd Cir. 1973), sub nom., *Balicer* v. *International Longshoremen's Assn. and New York Shipping Assn., Inc. (Consolidated Express, Inc.)*. The opinion of the same District Court awarding 10(1) injunctive relief on behalf of Twin Express, Inc. (TEI) is reported at 86 L.R.R.M. 2559 (D. N.J. 1974), sub nom., *Balicer* v. *International Longshoremen's Assn. and New York Shipping Assn., Inc. (Twin Express, Inc.)*.

JURISDICTION

The decision of the Court of Appeals was issued on June 29, 1976. A Petition for Rehearing With A Suggestion For Rehearing *En Banc*, timely filed, was denied by the Court of Appeals on August 6, 1976 (A97-A98), and judgment was entered on September 9, 1976 (A99-A101). The petitions for a writ of certiorari were filed on October 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the Rules on Containers, adopted

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which was filed with the court below and which the Board has since also lodged with this Court. Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

[2] 29 U.S.C. § 160(1).

and jointly enforced by the International Longshoremen's Association (ILA) and the New York Shipping Association (NYSA), violated Sections 8(b) (4) (ii) (B) and 8(e) of the National Labor Relations Act (the Act) because such Rules were designed to acquire for ILA pier-side members all container consolidation work which had previously and traditionally been performed by non-ILA (but otherwise unionized) employees of off-pier consolidators such as Twin Express, Inc. (TEI) and Consolidated Express, Inc. (CEI).

2. Whether the Board's decision was consistent with this Court's decision in *National Woodwork Manufacturers Assn.* v. *N.L.R.B.*, 386 U.S. 612 (1967).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73, Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in both petitions at pp. 3-4.

STATEMENT

The dispositive issue is whether the NYSA and the ILA, by enforcing their jointly adopted "rules on containers," unlawfully sought to obtain for ILA members certain container consolidation work previously and traditionally performed by the Teamster employees of various off-pier consolidators. Involving disputed questions of ultimate fact, this is precisely the kind of issue which is, and should be, committed to the Board's judgment.[3]

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[3] With only minor exception, the entire record in this case was developed before Judge Lacey in the two district court 10(1) injunction proceedings, *supra*. Both the ALJ and the Board relied only on that record in reaching their respective findings and conclusions.

A. The Parties

TEI and CEI are two of many off-pier consolidators, formally known before the Federal Maritime Commission as "non-vessel-owning common carriers" (NVOCCs), who are in the container consolidation business around the Port of New York and other ports throughout the country (A59; JA 711a). Their principal function is to receive from shippers small shipments—known in the trade as "less-than-container-load" (LCL) or "less-than-trailer-load" (LTL) shipments—which they then consolidate into large containers (35 and 40-feet in length) for immediate loading and transport on ocean going vessels. TEI opened its business in 1967 (A60; JA 711a). CEI has been in business under its present name since 1965; prior to that, it was operated under the name of Valencia Baxt Express since 1949 (A60; JA 768a, 785a-786a). TEI's employees are represented by IBT Local 707 which entered an *amicus* appearance in the court below; and CEI's employees are represented by IBT Local 807 which has participated as an intervenor in this litigation since its early stages (A60; A80). Both TEI and CEI are involved principally in the Puerto Rican trade (A59-A60; JA 711a-712a).

NYSA is an association of various employers, primarily ocean carriers and stevedoring companies, involved in the operations of the New York Port. Prior to 1971, the ocean carriers comprised NYSA's only voting members. From mid-1971 on, however, these carriers "turned the Association over to the stevedoring companies as the voting members" (A61; JA 897a). NYSA, and from 1970 onward, CONASA (the Council of North American Shipping Associates), conducted the collective bargaining on behalf of the Port

employers, with the ILA representing the longshoremen. Today the bargaining between NYSA and ILA results in a contract that covers all port employers and longshoremen from Boston to Hampton Roads, Virginia (A61; A3).[4]

B. Contentions of the Parties

1. *TEI and CEI*

In February, 1973, NYSA and ILA entered into an agreement which was known as the Dublin Supplement and which was designed to assure compliance with certain container rules under which NYSA agreed not to transport any containers from local off-pier consolidators (such as TEI and CEI) unless the containers were first unpacked ("stripped") and repacked ("stuffed") by ILA members. Enforcement of this Supplement threatened to destroy the businesses of TEI and CEI, as well as all other similar off-pier consolidators around the New York Port. As District Judge Lacey expressly found when, pursuant to Sections 8(b)(4), 8(e) and 10(l) of the Act, he enjoined enforcement of the Supplement and the rules generally, if such enforcement were allowed to continue, CEI "will have to cease operations" (364 F. Supp. at 227), and TEI "will soon be forced out of business" (86 LRRM at 2564). NYSA/ILA seek to excuse these consequences by contending that the ILA is merely seeking to preserve its work. But TEI and CEI believe that the object of the rules was not to preserve the ILA's work, but to take over work traditionally performed by the off-pier consolidation industry. In addition, TEI and CEI believe

[4] In their petitions herein, both the ILA (at p. 7) and the NYSA (at p. 13) assert that the container rules here in issue apply "from Maine to Texas".

that, to the extent ILA ever arguably had a claim to off-pier container consolidation work prior to 1959, that claim was negotiated away in the 1959 NYSA/ILA collective bargaining agreement. In return for regularly continuing royalty payments, the amount of which was set by an arbitral panel in 1960,[5] the ILA, in Section 8(a) of the 1959 agreement, expressly contracted away its claim by agreeing that, "[a]ny employer shall have the right to use any and all types of containers without restriction or stripping by the union" (A62, A71; JA 208a-209a, 329a-384a).

Thereafter—so Judge Lacey, the Board, intervenors and Judge Ordman all agree—thousands of off-pier LTL or LCL consolidated containers passed across the pier and on board vessels without any rehandling by ILA labor (A72; A28-A30, A43, 364 F. Supp. at 226, 86 LRRM at 2563). In the case of the thousands of TEI and CEI containers, the evidence indisputably established, as the Board expressly found, that "with few exceptions"—and those generally "coinciding with contract negotiations" —the ILA regularly "loaded such containers without stripping and restuffing" (A72; *id.*).

Even the pervasive contract amendments and totally new rules adopted by NYSA/ILA in 1969 and 1970

[5] In its petition herein (at p. 5), the ILA characterized these continuing royalty payments as "modest". The record contains no information as to the precise amounts of these payments. But the record contains an indication that in 1972 some 3,300 unemployed longshoremen were each receiving $16,500 annually (JA 1023a). Moreover, the record also shows that, between 1965 and 1972, some $100 million was received from the NYSA and spent by the ILA in Guaranteed Annual Income (GAI) payments to ILA members (JA 285a). Whatever claim the ILA may *arguendo* have had to off-pier consolidation work prior to the 1959 contract, therefore, has been—and continues to be—compensated for more than amply.

did not impede the continuing passage of these thousands of containers directly on board vessels free from any ILA interference (A63-66, A72). It was only after adoption of the Dublin Supplement in 1973, following an apparently amicable NYSA/ILA meeting in Dublin, Ireland, that the rules, as so supplemented, were first applied. The results, of course, were draconian. No containers were supplied by the steamship lines then in the trade (viz., Sea-Land, Seatrain and TTT) to the off-pier consolidators, and none of the lines would accept a container that was consolidated off-pier—even if it was a so-called "foreign" container leased by TEI from a railroad or leasing company.[6] In short, as a direct consequence of the Dublin Supplement, all local off-pier consolidation work for all practical purposes had to cease and be taken over exclusively by ILA labor on pier. For otherwise the ocean carriers would simply not accept any container locally packed off-pier, unless it were first stripped and restuffed by on-pier ILA labor; and this "make-work" process necessarily rendered off-pier consolidation at least superfluous and, in fact, doubly expensive.

2. *NYSA and ILA*

NYSA and ILA, on the other hand, argue that, despite the aforequoted terms of Section 8(a) of the 1959 agreement, the ILA obtained the right in the 1959

[6] Both ILA (pp. 7 and 8 of petition) and NYSA (pp. 4, 5 and 8 of petition) repeatedly imply that their rules applied only to containers supplied by the carriers. But the evidence showed, and the Board expressly so found, that the rules applied also to "foreign" containers (A66, A70; JA 719a-721a, and para. 3(f) on JA 250a). The practical effect of this extended application, of course, was to ensure that no local consolidation work could be performed with any containers off-pier and that all such consolidation work could thenceforth be performed only by on-pier ILA labor.

agreement to strip and restuff all LTL and LCL containers which were packed by off-pier consolidators within the Port of Greater New York or, more specifically, within a 50-mile radius of the New York Port. NYSA/ILA further suggest that from 1959 forward these rules were regularly enforced but that, as a result of certain enforcement difficulties that were encountered, the rules were amended in the 1968 agreement (adopted in early 1969), later again amended in 1970, and still further amended by the Dublin Supplement in 1973 to eliminate the enforcement difficulties and to assure that all local LTL and LCL containers were packed on pier by ILA labor. Moreover, if they were packed off-pier, then the ILA could either "make work" by stripping and restuffing the containers once they arrived on the pier or, as the 1970 agreement provided, the ILA could assess any carrier which accepted such containers without the "make-work" a "liquidated damage" penalty of $1,000 per container. NYSA/ILA, however, do not dispute the fact that thousands of such containers year after year—from the 1950s up to the time of the Dublin Supplement—regularly passed over the piers unimpeded and free from any "liquidated damage" penalty, but contend that these were all due to the enforcement difficulties.[7] Accordingly, so NYSA/ILA now argue, enforcing the Dublin Supplement does no more than preserve work to which ILA members

[7] The ILA contends (p. 8 of petition), as does NYSA (p. 9, note 8 of petition), that these containers avoided the rules because of the "acquiescence or connivance of the major ocean carriers." But the tally sheets and other documents of record herein clearly establish that, if nothing else, ILA members were at least totally aware of the fact of these containers and their regular unimpeded passage through the Port (JA 288a, 290a, 299a, 306a, 456a, 457a, 470a, etc.).

were always, and are still, entitled. And as such, the NYSA/ILA activities are protected under the *National Woodwork* exception to the secondary boycott provisions of the Act—irrespective, so it is argued, of the terminal effect this conclusion will have on the off-pier consolidation industry around New York and other Ports.

C. The Board's Conclusions and Order

On these facts, the Board concluded that CEI and TEI "have traditionally been engaged in the work of stuffing and stripping containers such as are here in controversy" (A69), that with only "few exceptions, ILA has loaded such containers without stripping and restuffing" (A72), and that any on-pier stripping and stuffing work "performed by longshoremen as an incident of loading and unloading ships does not embrace the work traditionally performed by CEI and TEI at their own off-pier premises" (A69).[8] The Board further concluded that even if the ILA could

[8] Despite ILA assertions, the record contains almost no evidence as to any tradition of ILA labor having stripped or stuffed containers on pier. This lacuna was recognized, and in part explained, by ALJ Ordman (A36, n. 8). To the extent that such work was done, however, it was with respect only to LTL shipments that were made directly to the ocean carriers for consolidation by them rather than by off-pier consolidators. In any event, the record does establish that it was not until February, 1973 that Seatrain had any on-pier facilities to do any stripping and stuffing work (JA 1029a-1030a, 1035a-1036a), and it was likewise not until that time that TTT had anything other than "a small facility" which was adequate "only . . . to stuff their own cargo" (JA 717a). Indeed, it was apparently not until November, 1972 that NYSA/ILA even decided to establish on-pier consolidation stations (JA 498a, 501a-502a, 506a)—obviously only in anticipation of capturing the off-pier consolidation work through the enforcement of new rules such as those that were adopted a few weeks later in Dublin.

establish its own tradition of stripping and stuffing, nevertheless "[i]t does not fall within ILA's traditional role to engage in make-work measures by insisting on stripping and stuffing cargo merely because that cargo was originally containerized by nonunit personnel" (A70). And otherwise, the ILA's demands could only be met if the work "traditionally . . . performed by employees in other units" were now to be "taken over and performed at the pier by longshoremen represented by ILA" (*Id.*). All of these circumstances, combined with the additional fact that NYSA/ILA were now applying their rules also to encompass "foreign" containers, moved the Board to conclude that the ILA was not seeking simply to preserve its traditional work but to acquire work unlawfully. Finally, the Board also held that whatever claim the ILA might arguably have had to the work prior to 1959 was, in any case, abandoned by the ILA in the 1959 Agreement in return for the *quid pro quo* of royalty payments.[9] On the basis of all of these conclusions, the Board held that NYSA/ILA violated Sections 8(b)(4) and 8(e) of the Act and that the work preservation exception of *National Woodwork* was inapplicable.

D. The Decision of the Court of Appeals

A majority of the court below held, as did the Board, that the NYSA/ILA activities were not protected within *National Woodwork* and, accordingly, that the NYSA/ILA activities violated Sections 8(b)(4) and 8(e) of the Act because "the ILA's real object was to obtain . . . work traditionally performed by employees not represented by ILA" (A89-A91).

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[9] See note 5 *supra* and accompanying text.

ARGUMENT

1. In *National Woodwork, supra*, p. 644, this Court held that whether otherwise unlawful secondary activities are rendered lawful on grounds that they seek merely to preserve work in the face of technological change depends upon "whether, *under all the surrounding circumstances* [footnote omitted], the Union's objective was preservation of work for [the unit] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere" (emphasis added). If the objective is the latter, the activities are secondary and unlawful. In the face of the facts in this case, we think there can be no question but that the Board's conclusion is proper and supported by substantial evidence. For as we shall next show, this case does not conflict with—but properly applies—the rule of *National Woodwork*.

Rather than limiting its focus, as did dissenting Circuit Judge Feinberg and ALJ Ordman below, only to the work done by the ILA, the Board in this instance focused, as *National Woodwork* requires, on "all the surrounding circumstances." Thus, in focusing on the ILA and its work, the Board found that "[t]he traditional work [of] the longshoremen represented by ILA has been to load and unload ships" and that "stripping and stuffing work [was] performed by longshoremen as an incident of loading and unloading ships" and "when necessary to perform their loading and unloading work" (A69). Certainly these findings are supported by substantial evidence on the record. Equally supported, moreover, is the Board's critically important additional finding that "[t]he limited stripping and restuffing performed by ILA at times coinciding with contract negotiations re-

veals, at most, attempts on the part of ILA to bolster its bargaining position" (A72).

While ILA thus performed consolidation merely as an incident to its traditional work or as a means to gain a bargaining chip for use in its negotiations with NYSA, consolidation is the very life blood of TEI and CEI. Focusing on this as another of "all the surrounding circumstances", the Board arrived at two further findings equally supported by substantial evidence: (1) "[t]he consolidators generate such work themselves, performing it not on behalf of the employer-members of NYSA but for their own customers who have goods to ship" (A69); and (2) TEI and CEI "have traditionally been engaged in the work of stuffing and stripping containers such as are here in controversy" (*Id.*). These findings, we submit, were probative in demonstrating that ILA was not using the container rules as a "shield" for work preservation, but as a "sword" for work acquisition (*National Woodwork, supra,* p. 630); and the Board was clearly entitled to weigh these critical factors as part of "all the surrounding circumstances."

Perhaps the most revealing evidence supporting the Board's conclusion that the ILA was in fact trying to take over work performed by CEI and TEI was paragraph 3(f) of the rules, which prevented CEI and TEI from using "foreign" containers—those not supplied by NYSA members but leased by off-pier consolidators from railroads or leasing companies (JA 70a-71a). For there simply can be no question but that the ILA had no tradition of ever having consolidated any but carrier-supplied containers. Indeed, this may well be the very case implicitly condemned by Justice Brennan when, in *National Woodwork, supra,* p. 630, he spoke

of a union objective "to reach out to monopolize jobs." Cf. *Allen Bradley Co.* v. *Local Union No. 3, IBEW,* 325 U.S. 797 (1945). For it cannot be gainsaid but that this was precisely the ILA's objective here.

Finally Section 8(a) of the 1959 agreement certainly provided the Board with a reasonable basis for its conclusion that the ILA had, in any event, surrendered any claim that it might have had to the stuffing and stripping work in controversy (JA 91a). The record as a whole, therefore, contained more than substantial evidence to support the conclusion reached by both the Board and the court below that the rules did not have the lawful purpose of work preservation, but that their real object was to obtain work traditionally performed by employees not represented by ILA.[10]

2. NYSA/ILA advance dark suggestions of potentially disastrous consequences in the event the Board's decision is not reversed. But the fact of the matter is that there will hardly be any effect at all on present

[10] Petitioners and dissenting Circuit Judge Feinberg erroneously accused the Board of "focusing" only on the work done by CEI and TEI while ignoring the work done by the ILA. It is clear, however, that the Board gave careful consideration to "all of the surrounding circumstances"—not just the work customarily done by CEI and TEI, but the work actually done by the ILA and the specific provisions of the NYSA/ILA contracts relating to this work. Thus, rather than focusing on any one factor, the Board, as it should, gave ample attention to all factors and all circumstances. In this regard, moreover, it was clearly appropriate for the Board to take into consideration the fact that the consolidators not only generated their work themselves but that they traditionally performed the work of stuffing and stripping containers. For contrary to petitioners' contentions, these facts are clearly relevant in demonstrating that the ILA's true object was not to preserve its own work, but to encroach upon work generated and performed by others.

longshore work. Prior to the 1973 Dublin Supplement, virtually all the containers of all the off-pier consolidators passed over the pier without ILA interference. Shortly after Dublin, Judge Lacey issued his two decisions enjoining NYSA/ILA from enforcing the rules at least *vis-a-vis* TEI and CEI. Nor, so far as we are aware, are NYSA/ILA at the present time enforcing the rules *vis-a-vis* any off-pier consolidator. The Court of Appeal's decision, therefore will have virtually no practical effect on present longshore work. More importantly, that decision will have the highly beneficial effect of assuring that precisely the same conditions will exist "from Maine to Texas"[11] as exist now in every West Coast port. For only a short time prior to its decision in this case, the Board held unlawful an almost identical work acquisition effort by the West Coast longshoremen. There too the Board held that the longshore effort was not within the protective ambit of *National Woodwork* and, accordingly, violated 8(b)(4) and 8(e) of the Act. *ILWU, Locals 13 and 63 (California Cartage Co., Inc.)*, 208 NLRB 994 (1974). The Board's decision was enforced *per curiam* without opinion by the District of Columbia Court of Appeals, sub nom., *Pacific Maritime Association* v. *N.L.R.B.*, 515 F.2d 1018 (D.C. Cir. 1975), and this Court denied certiorari only as recently as last March in No. 75-684 (424 U.S. 942). A denial of certiorari here, therefore, will assure uniformity throughout all the ports of this nation.

3. NYSA/ILA reliance on *Intercontinental Container Transport Corp.* v. *NYSA and ILA*, 426 F.2d 884 (2d Cir. 1970) is misplaced. In their Petition to

[11] See note 4, *supra*.

the court below for Rehearing with Suggestion *En Banc*, NYSA/ILA raised, as here, the same issue concerning alleged inconsistency of holdings within the Second Circuit. Presumably that argument should have been far more persuasive to the Second Circuit than here. Yet, the very fact that the Second Circuit denied rehearing and rehearing *en banc* demonstrates that, responsive through that Court is to labor and labor union concerns, it saw no inconsistency between the decisions. And, indeed, there is none. For *ICTC* was not a labor case but an antitrust action, and the parties to that litigation did not once dispute whether the objective of the rules was that of work preservation. The consolidator (ICTC) opted to concede a work preservation objective but argued an antitrust violation nevertheless. Given such a litigation context, it can hardly be suggested that *ICTC* was a "test" (ILA petition at p. 7) of the validity of the rules under the Labor Act.[12] In addition, the doctrine of primary jurisdiction would require that any holding as to whether the container rules have the objective of work preservation must be made in the first instance by the Labor Board, not by the Court of Appeals. *Far East Conference* v. *United States*, 342 U.S. 570 (1951); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959) and cases cited therein. But even if, contrary to fact, the instant decision conflicted with *ICTC*, an intra-circuit conflict is not ordinarily a valid ground for granting certiorari. Stern

[12] Moreover, *ICTC* arose long before the Dublin Supplement—the negotiation and enforcement of which most probably reflected the ascendancy within NYSA of the stevedore companies which, because they actually consolidate, have a greater interest in driving consolidation work to the piers (rather than simply having the ILA continue to collect royalties).

and Gressman, *Supreme Court Practice* § 4.6 (B.N.A. Inc. 1969)

4. NYSA/ILA reliance on *Pittston Stevedoring Corp.* v. *Dellaventura*, —F.2d—(2d Cir. 1976), *Stockman* v. *John T. Clark & Son of Boston, Inc.*, 539 F.2d 264 (1st Cir. 1976), and *Leathers Best, Inc.* v. *S. S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971) is also misplaced. Whatever compensation ILA members might be entitled to under legislation enacted only for their benefit—the Longshoremen and Harbor Workers Compensation Act (33 U.S.C. 901, *et seq.*)—hardly determines whether, as here, the ILA should be able to destroy the off-pier consolidation industry in an effort to monopolize job tasks for its own members. And the determination in *Leathers Best* as to whether a container is a "package" for purposes of the Carriage of Goods by Sea Act (46 U.S.C. 1300 *et seq.*) is even less related to the issues here. In short, whether or not the language fits, the shoe certainly does not.

5. Finally, ILA's reliance (at pp. 13-14 of its petition) on a number of other work preservation cases is unavailing. As Justice Brennan observed in *National Woodwork, supra,* p. 645, determining the validity of a work preservation claim "will not always be a simple test to apply." The cases cited by ILA do nothing more than offer precedents—limited to the specific facts of those cases and, hence, not overly helpful here. But if previously decided cases are to be deemed important, we would look to Justice (then Judge) Stewart's decision in *N.L.R.B.* v. *Local 11, United Brotherhood of Carpenters,* 242 F.2d 932 (6th Cir. 1957) and also to the decision in *Joliet Contractors Association* v. *N.L.R.B.*, 202 F.2d 606 (7th Cir., 1953), cert. den., 346 U.S. 824. Both of these cases

were cited with approval by Justice Brennan in his decision in *National Woodwork* (*supra,* p. 645, n. 1), and both would plainly support the result reached here by the Board and the court below.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-569

NEW YORK SHIPPING ASSOCIATION, INC., *Petitioner,*
v.
NATIONAL LABOR RELATIONS BOARD, ET AL., *Respondents.*

No. 76-570

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *Petitioner,*
v.
NATIONAL LABOR RELATIONS BOARD, ET AL., *Respondents.*

BRIEF OF INTERVENOR-RESPONDENT CONSOLIDATED EXPRESS, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred in holding that there was substantial evidence to support the NLRB's decision that agreements between petitioners violated Sections 8(b)(4) and (e) of the National Labor Relations Act in that they had an unlawful secondary objective—namely, the acquisition for members of the Internatonal Longshoremen's Association of container packing work which had traditionally been performed off the pier by non-ILA employees of intervenor and other freight consolidators.

COUNTERSTATEMENT OF THE CASE

I. Parties and Proceedings Below

On June 1, 1973, Consolidated Express, Inc. ("CEI"), an intervenor-respondent herein, filed unfair labor charges with the National Labor Relations Board ("NLRB") against the International Longshoremen's Association ("ILA") and the New York Shipping Association ("NYSA"), petitioners herein, alleging that ILA had engaged in a secondary boycott in violation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act (the "Act") and that petitioners together had maintained and given effect to "hot cargo" agreements in violation of Section 8(e) of the Act. The charges arose out of the enforcement of the Rules on Containers negotiated between petitioners. Pursuant to those Rules, NYSA agreed that its members would be precluded from supplying containers to CEI or other similarly situated freight consolidators who had traditionally packed ("stuffed") LCL or LTL containers[1] at their own off pier facilities. The

[1] Containers with consolidated loads are frequently described as "LTL" (less than trailer load) or "LCL" (less than container load). The two terms merely indicate a quantity of freight less than that which a container can hold.

Rules also required that ILA members on the pier unpack ("strip") and restuff all containers shipped by such consolidators.

Having concluded that ILA and NYSA had violated the Act by adopting, maintaining and enforcing the Rules on Containers, the Regional Director of the NLRB petitioned the United States District Court for the District of New Jersey for a preliminary injunction pursuant to Section 10(1) of the Act. Following extensive evidentiary hearings, District Judge Lacey granted the requested injunction, a decision affirmed by the Third Circuit.[2]

The record established in the injunction proceedings, supplemented by affidavits, was agreed by all parties to constitute the record for the unfair labor practice charges before the NLRB. On review, the full NLRB reversed an initial decision rendered by Administrative Law Judge Ordman. The Board found that CEI as well as other consolidators had traditionally stuffed and stripped LCL or LTL containers at off pier facilities using teamster employees and that alleged ILA stripping and restuffing of CEI's containers had not occurred. The court noted that the non-ILA work tradition with respect to container consoli-

[2] Balicer v. International Longshoremen's Ass'n, AFL-CIO, 364 F.Supp. 205 (D.N.J.), *aff'd*, 491 F.2d 748 (3d Cir. 1973). Twin Express, Inc. ("Twin"), also an intervenor-respondent herein, filed parallel charges against ILA and NYSA on November 2, 1973. Following issuance of a consolidated complaint by the General Counsel of the NLRB, Judge Lacey issued a similar injunction in the Twin case, Balicer v. International Longshoremen's Ass'n, AFL-CIO, 86 LRRM 2559 (D.N.J. 1974).

dation predated or at least paralleled any arguable related ILA work history. In these circumstances, the Board held that, by maintaining and enforcing the Rules on Containers, petitioners unlawfully sought to obtain for ILA labor the traditional off dock work of stuffing and stripping CEI's containers and thus violated Sections 8(b)(4) and (e) of the Act.[3]

Petitioners then appealed to the United States Court of Appeals for the Second Circuit. Finding the Board's decision "supported by substantial evidence and by sound analysis," the court of appeals upheld the Board and granted the NLRB's cross-motion to enforce its order.[4] Petitioners' motion for a rehearing with a suggestion for rehearing en banc was denied on August 6, 1976.[5]

II. Factual Background

The labor jurisdiction of longshoremen has historically been defined in terms of location—namely, the docks. Longshoremen's work involves principally the loading and unloading of ships and other incidental functions performed *at the docks*. By contrast, the history of consolidation and containerization of freight has, from the beginning, involved a significant *off dock* work tradition by teamsters and other non-ILA per-

[3] Decision and order of the NLRB are reprinted in the Joint Appendix to the Petition at A58-A78. Subsequent references to this decision will be to Joint Appendix pages.

[4] The decision of the Second Circuit is reprinted in the Joint Appendix to the Petition at A79-A96. Subsequent references to the decision will be to Joint Appendix pages.

[5] The orders denying rehearing and rehearing en banc are reprinted at A97-A93 of the Joint Appendix to the Petition.

sonnel. Despite this tradition, ILA sought through the Rules on Containers to acquire the off dock work of stuffing and stripping LTL and LCL containers—work which clearly had never been done by ILA members. A brief review of the history of CEI, the freight consolidation business, and the role of teamsters with respect to cargo and container handling places the non-longshoremen work tradition in clear perspective.

The History of CEI. CEI and its predecessor, Valencia-Baxt Express, Inc. ("Val-Baxt"), have for many years performed specialized common carrier services including freight consolidation and container stuffing and stripping at their own off dock facilities. As non-vessel-operating common carriers ("NVOCCs"), they have acted on behalf of shippers to stuff freight shipments into containers, ship the containers between New York and San Juan via maritime common carriers on a single bill of lading, strip the containers at their warehouse facilities, and distribute the freight shipments to their ultimate consignees.[6]

In the earlier days of containerization, Val-Baxt used 7 or 8 foot so-called "Dravo" boxes. Somewhat larger containers were introduced by the early 1950's. (72a-73a, 794a-795a.) From the beginning of this service, the maritime carriers had hoist equipment with which fully loaded containers were placed directly from the pier abroad the consolidator's truck or were unloaded from the truck upon arrival at the pier for

[6] 72a-75a, 724a-725a, 794a. References in this format are to the Appendix filed in the court of appeals. *See* Hasman & Baxt, Inc., Valencia Baxt Express, Inc., 8 FMC 453, 454 (1965).

shipment to San Juan. The work of stuffing and stripping such containers was done by Val-Baxt with teamsters and without ILA interference. With the formation of CEI as a successor to Val-Baxt, these operations continued unchanged and unchallenged by ILA.

CEI's experience is typical of that of other freight forwarders. From the earliest years of consolidation, the truckmen rather than the longshoremen were primarily responsible for sorting and consolidating maritime cargo. For example, truckmen would collect shipments for particular ports and deliver them to the appropriate pier. (63a-65a, 71a-72a.) Systematic consolidation of individual shipments took place in a variety of ways, but almost always at the direction of the truckmen.[7]

In the mid-1950's, new types of vessels, specifically designed to carry large containers, were introduced by maritime common carriers. As much as 20 to 40 feet long, these containers were, in effect, over-the-road truck trailers. They could be placed directly on tractor and chassis rigs as an actual part of the truck, driven on and off the docks, and delivered to inland consignees with no further handling. Thus, the cargo which the new container vessels carried, the entity upon which the carrier's cargo rates were based, was the container itself.[8]

In the earliest stages of containerization, petitioners recognized the tradition of consolidating containers off the docks. Indeed, tariffs filed with the Federal

[7] *See* Investigation of Practices, Operations, Actions, and Agreements of Ocean Freight Forwarders, 6 FMC 327, 334-35 (1961).

[8] 846a-850a. *See also* Addendum A to CEI's Brief in the court of appeals.

Maritime Commission by NYSA members show that consolidation off pier was mandatory in order to qualify for the tariff rate under which consolidated containers have been and are shipped—namely, Freight-All-Kinds.[9] No meaningful change in the tariff was filed until 1973, when the events leading to this case began.[10]

By 1959, it was clear that non-ILA workers already had a tradition of stuffing and stripping all types of containers off the pier. In the 1959 ILA-NYSA collective bargaining agreement, ILA recognized the practice of off pier container stuffing and stripping by non-ILA employees and secured various monetary concessions to meet the problem of advancing technologies, including containerization. Section 8(a) of the contract stated that there was to be no ILA stripping and restuffing or any other restriction on the handling of containers, except that a royalty was to be paid on containers not originally stuffed or stripped by ILA members.[11] Petitioners construct an argument, rejected

[9] *See* Addendum A to CEI's Brief in the court of appeals, especially Pan-Atlantic's July 16, 1958 tariff, Notes 1, 5, 9. The limitation on liability established under Note 9 was acceptable to the shipper-consolidator because the containers were sealed and not subject to rehandling, loss, or pilferage. *See also* 1107a-1108a.

[10] *See* Puerto Rico Maritime Shipping Ass'n, Nos. 73-17, 74-40 (FMC, October 9, 1975) (Morgan, ALJ), finding the 1973 changes unlawful. Those changes had been designed to force the consolidators to bear the $1000 fine levied under the Rules on Containers for each consolidated container not stripped and restuffed on the pier.

[11] Section 8 of the 1959 collective bargaining agreement states:
Containers:—Dravo Size or Larger
a. *Any employer shall have the right to use any and all type of containers without restriction or stripping by the union.*
b. The parties shall negotiate . . . the question of what should

below, that this provision recognizing off pier stuffing and stripping without ILA interference applied only to so-called shippers' loads, not to consolidated LTL or LCL containers.[12] However, the text of the contract and petitioners' own actions belie this contention. As the NLRB and the court of appeals found, the containers of Val-Baxt, CEI, and other consolidators were not stripped, restuffed, or otherwise interfered with by ILA during the entire term of the 1958 collective bargaining agreement and continuously thereafter until the events giving rise to this case.

ILA's Efforts to Acquire Off Pier Container Work. Prior to 1968, perhaps because of the continued growth of containers, the ILA did initiate some unsuccessful steps to acquire the work of off pier consolidators.[13] In 1968, ILA and NYSA agreed to the so-called Rules on Containers which required, in effect, that all consolidation of LTL cargo be performed at ILA-manned waterfront facilities.[14] These Rules, manifestly intended to acquire the work of consolidators, were inconsistent with the Freight-All-Kinds tariff provisions that require stuffing and stripping outside the pier. Moreover, the agreement provided for pay-

be paid on containers which are loaded or unloaded away from the pier by non-ILA labor . . . . 208a-209a (emphasis added).

[12] Petition of ILA at 5; Petition of NYSA at 7-8.

[13] *See* 67a-70a, 103a, 107a-110a, 113a, 120a.

[14] The Rules required that containers holding LTL shipments, originating or destined within a 50-mile radius of the port in which the container was either loaded aboard or discharged from a vessel and whose contents were not beneficially owned by a single person, would be stripped and stuffed on pier by ILA deep-sea labor.

ment by the maritime carrier of a fine of $250 per container (subsequently increased to $1000 per container in 1973) for each container shipped in violation of the Rules.

Notwithstanding the 1968 Rules on Containers, until 1973 containers loaded by CEI went through the Port of New York without interference.[15] In that year, ILA and the Council of North American Shipping Associations ("CONASA"), which includes NYSA, formally adopted restrictive new rules at a meeting in Dublin. These "Dublin Rules" provided that NYSA members could no longer supply containers to off pier consolidators. The containers are of course the life blood of the freight consolidation business—without containers, the business cannot function. A list of 14 proscribed consolidation facilities, including those operated by CEI, was circulated among NYSA members. Shortly thereafter, various officials of the three U.S.-Puerto Rican maritime carriers (Sea-Land Service, Inc., Seatrain Lines, Inc., and Transamerican Trailer Transport, Inc.) advised CEI's officers that they would no longer supply CEI with containers unless CEI moved its operations to the waterfront and substituted ILA deep-sea labor for its teamster platform and driver personnel. This alternative was simply not economically or practically feasible.[16] Faced with extinction, CEI filed the unfair labor practice charges which are the subject of this case.

[15] *See* the NLRB's decision at A72 and the court of appeals decision at A88.

[16] For example, CEI has a collective bargaining agreement with the teamsters that could not be set aside by moving to the docks.

Based on the above facts, the NLRB rendered an opinion that the Rules on Containers were tactically calculated to benefit the ILA generally and sought to acquire work that had not been traditionally the work of the union. Finding these Rules violative of Sections 8(b)(4) and 8(e) of the Act, the NLRB issued an order that the petitioners cease and desist from maintaining or implementing the Rules. The court of appeals found the Board's decision to be supported substantial evidence and enforced the order of the NLRB.

REASONS FOR DENYING THE WRIT

I. The Decision of the Court Below Does Not Conflict with Prior Decisions of this Court

In seeking a Writ of Certiorari, Petitioners have attempted to create a conflict between the decision below and this Court's ruling in *National Woodwork Manufacturers' Association* v. *NLRB,* 386 U.S. 612 (1967). No such conflict exists. To the contrary, the decision in this case conforms to and properly applies the guidelines set forth in *National Woodwork* for determining whether a boycott provision is permissable work preservation or unlawful secondary work acquisition.

In *National Woodwork,* the Court defined the reach of Sections 8(b)(4) and 8(e) of the Act as permitting work preservation actions directed toward the primary employer, while prohibiting activities that sought the acquisition of neutral employees' work. Thus, the critical issue in the case of a collective bargaining agreement which seeks to limit certain work to unit members is the objective of the union action. In evaluating

such provisions, the Court required consideration of "all the surrounding circumstances" to determine whether the union's objective was work preservation or whether the agreement and boycott were tactically calculated to satisfy general union objectives. 386 U.S. at 644-45. The Court pointed to such circumstances as the history of labor relations in an industry, its "economic personality," and the threat of displacement by the banned products or services. *Id.* at 644 n. 38. It recognized that the difference between primary work preservation and illegal secondary work acquisition involves precise factual determinations:

> There need not be an actual dispute with the boycotted employer . . . for the activity to fall within this [prohibited] category. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees. This will not always be a simple test to apply. (*Id.* at 645 (footnotes omitted).)

In *National Woodwork* the NLRB had determined, in light of the facts before it, that the object and effect of the agreement in question was work preservation and not secondary work acquisition. This Court held that the NLRB's decisions was supported by substantial evidence. In the present case, the NLRB found that the Rules on Containers had an illegal secondary purpose and effect, in that they represented an attempt by ILA to reach beyond its traditional work jurisdiction and to acquire work which longshoremen had never performed. The Second Circuit affirmed the NLRB's determination. The record below contains substantial, indeed overwhelming, evidence of the secondary nature of the Rules on Containers.

In light of this evidence, the decisions of the NLRB and the court below do not contravene *National Woodwork*. Those decisions recognize the existence of a non-ILA tradition of freight consolidation for shipment in maritime containers which substantially predates any ILA tradition in the performance of any arguably related work. With NYSA's participation, ILA sought to acquire that off pier work, which its members had never performed, by promulgating and enforcing the Rules on Containers. Such an effort is secondary and illegal. Employees cannot "preserve" and cannot "reacquire" work which they have never performed.

ILA and NYSA contend that the NLRB and the court below impermissably focussed on the work done by the off pier consolidators, rather than that performed by longshoremen. This argument lacks a basis in logic or legal authority. The Supreme Court in *National Woodwork* clearly contemplated an inquiry into all the "surrounding circumstances" of a union's boycott activity. These circumstances necessarily include the nature of the work which the subject bargaining unit is attempting to reserve to itself and the economic effect of the boycott on other employers and employees in the industry. The existence of parallel competing labor traditions with superior claims to the work at issue, and which stand to be destroyed by the boycott activity, has an obvious impact on the determination of whether the bargaining unit is pursuing illegal secondary objectives.

To examine only the work done by the longshoremen, as petitioners suggest, and to conclude that they may acquire any work similar to that which they perform on the docks, is to ignore the long-standing work tradition of teamsters and other off pier workers. Moreover, petitioners' approach would effectively abolish the distinction between primary and secondary activity. The sole criteria would be the determination and economic leverage of any union which chooses to expand its work jurisdiction. The Board's decision, by contrast, preserves the Act's purpose in outlawing secondary boycotts and hot cargo agreements and correctly applies the teaching of *National Woodwork*.

II. The Decision Below Creates No Conflict with the Decisions of Other Circuits

Petitioner ILA claims that the decision in this case conflicts with other cases decided by the courts of appeals. Specfically, it cites doctrines of "fairly claimable work," "customary work function," and "work recapture," each of which it identifies with a different circuit. (Petition of ILA at 13-14.) This attempt to create conflict where none exists must fail. Each of the cases cited was decided on its own facts and surrounding circumstances, inapplicable to those in the present case.

For example, the "work recapture" cases[17] stand for the proposition that collective bargaining agreements can legitimately provide for the reacquisition of traditional unit work which has been partially lost. No such issue is involved in this case. The stuffing and stripping of containers at off dock facilities was not the traditional work of ILA. Rather, ILA attempted to extend its jurisdiction to an area where it had no

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[17] *E.g., Meat & Highway Drivers, Local 710* v. *NLRB*, 335 F.2d 709 (D.C. Cir. 1964), *American Boiler Manufacturers Ass'n* v. *NLRB*, 404 F.2d 547 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (1970).

traditional work. Under those circumstances, the issue of work recapture does not arise.[18]

ILA seeks to transmute the "fairly claimable work" doctrine, essentially a restatement of the *National Woodwork* test, into a "some begets all" argument whereby the "sparse" record evidence[19] that ILA members sometimes containerized loose cargo brought to the piers would entitle them to claim all containerization work done off the piers. Such an argument is clearly at odds with the work preservation doctrine of *National Woodwork*. As stated by Justice Harlan in his accompanying memorandum in *National Woodwork:*

> This, then, is not a case of a union seeking to restrict by contract or boycott an employer with respect to the products he uses, for the purpose of acquiring for its members work that had not previously been theirs.[20]

As the D.C. Circuit has recognized, such doctrines as "work recapture" and "fairly claimable work" ap-

[18] Cases relying on the doctrine of "fairly claimable work" or "customary work function" are equally inapplicable here. In *Canada Dry Corp.* v. *NLRB*, 421 F.2d 907 (6th Cir. 1970), retail clerks successfully claimed work which was not only identical, in kind and in location, to that which they were already performing, but which they had in fact previously performed. 421 F.2d at 909. Similarly, *compare Sheet Metal Workers Int'l Ass'n Local 223* v. *NLRB*, 498 F.2d 687, 695-96 (D.C. Cir. 1974) *with Sheet Metal Workers Int'l Ass'n, Local 98* v. *NLRB*, 433 F.2d 1189, 1194-95 (D.C. Cir. 1970).

[19] ALJ's decision at A36 n.8.

[20] 386 U.S. at 648. *See also* NLRB v. National Maritime Union, 486 F.2d 907, 913-14 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); Local 282, IBT (D. Fortunato, Inc.), 197 NLRB 673, 80 LRRM 1632 (1972).

ply only to jobs in which the union has "a valid work preservation interest" as defined by *National Woodwork. Sheet Metal Workers, supra,* 498 F.2d at 693. The NLRB's decision and order here are not in conflict with circuit court decisions applying those doctrines because ILA had no such valid interest in the work it sought to acquire from off pier workers.[21]

More importantly, the Second Circuit's decision in this case is entirely consistent with a decision whch neither petitioner has seen fit to cite. That case, *International Longshoremen's and Warehousemen's Union, Local 13 (California Cartage Co.)*, 208 NLRB 994, 85 LRRM 1300 (1974), *enforced sub nom. Pacific Maritime Ass'n* v. *NLRB*, 515 F.2d 1018 (D.C. Cir. 1975), *cert. denied,* 96 S. Ct. 1409 (1976) (*"Cal Cartage"*), is essentially identical in facts and outcome to the present case.

Cal Cartage grew out of an effort by the International Longshoremen's and Warehousemen's Union ("ILWU"), the West Coast longshoremen, to acquire the stuffing and stripping work of employees of off dock consolidators through the imposition of rules on containers similar to those at issue in this case. Charges were filed against the union and PMA, the West Coast maritime employer's association, by off pier consolidators. An extensive record was compiled showing that the off dock workers had a long tradition of container

[21] Local 742, United Bro. of Carpenters v. NLRB, 444 F.2d 895 (D.C. Cir.), *cert. denied*, 404 U.S. 986 (1971), also cited by ILA, does not discuss the issue of "fairly claimable work," but instead rejects the "right to control" doctrine. The "right to control" doctrine is not an issue in the present case, despite the efforts of petitioners to link this case with *Enterprise Ass'n of Steam, Etc. Local No. 638* v. *NLRB*, 521 F.2d 885 (D.C. Cir. 1975) *cert. granted*, 96 S. Ct. 1101 (1976), recently argued before this Court.

work which paralleled that of the ILWU members. The NLRB concluded that the ILWU did not have a claim to the off dock work. The D.C. Circuit affirmed after argument but without an opinion, and this Court denied certiorari. In short, the instant case is entirely consistent with the decision by the D.C. Circuit on the West Coast version of the Rules on Containers.[22]

III. The Decision Below Does Not Conflict with Prior Decisions of the Second Circuit

Petitioners also assert a novel theory that this Court should grant certiorari because the decision of the court of appeals conflicted with two other Second Circuit decisions, *Intercontinental Container Transport Corp.* v. *New York Shipping Association,* 426 F.2d 884 (2d Cir. 1970), *rev'g* 312 F. Supp. 562 (S.D.N.Y.) (*"ICTC"*); and *Pittston Stevedoring Corp.* v. *Dellaventura, Etc.,* Docket Nos. 76-4042, 76-4009, 76-4043 and 75-4249 (2d Cir. July 1, 1976), *petition for cert. docketed,* No. 76-454. Not surprisingly, these supposed conflicts did not impress the court of appeals.[23]

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[22] The only substantial factual distinctions between *Cal Cartage* and the present case tend to strengthen the decision of the NLRB and the Second Circuit in this case. In *Cal Cartage* the off pier consolidators were direct subcontractors of the longshore employers' association, PMA. The work at issue had long been performed directly for the account of and pursuant to contract with the maritime shipping companies represented in PMA. In this case, CEI and Twin have operated as independent NVOCCs for their own account not on behalf of or by contract with the maritime shipping companies. Thus, ILA's actions were not aimed at preventing contracting out of work by NYSA, but were purely acquisitive and secondary. Even more clearly than was the case in *Cal Cartage*, the off pier work at issue is not "fairly claimable" by the longshoremen.

[23] Petitioners failed to gain the request of even one circuit judge that a vote on rehearing en banc be taken. A98.

ICTC was an antitrust case brought under the Sherman Act. Plaintiff ICTC alleged that NYSA and ILA had combined and conspired to misuse the container rules by refusing to admit it to NYSA membership and refusing to negotiate with it an ILA collective bargaining agreement, thereby preventing it from competing with stevedore members of NYSA.[24] After the district court granted a preliminary injunction to ICTC, the Second Circuit reversed. Since the NLRB had not decided on the legality of the Rules on Containers, they were regarded by the Court as valid work preservation measures.[25]

As the court of appeals stated in *ICTC,* the issues in that case were based on different allegations and sought a different remedy from those raised in the present action under the National Labor Relations Act.[26] In the present case, the validity of the later and more patently secondary 1973 Dublin Rules on Containers has been challenged directly, and here the NLRB has

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[24] 312 F. Supp. at 567-68. ICTC had previously filed charges with the NLRB alleging that the Rules on Containers violated Sections 8(b)(4) and 8(e) of the Act. The Regional Director and the General Counsel of the NLRB had rejected these charges. A separate suit by ICTC against NYSA and one of its members had also been dismissed, on the ground that NLRB's jurisdiction preempted that of the court. *Id.*

[25] The district court had so assumed, 312 F.Supp. at 573-74, and ICTC explicitly agreed in its brief to the court of appeals:

> *ICTC has not attacked the validity of these Rules, for they appear to be job-saving* if properly utilized, but it is the illegal anticompetitive implementation by the appellants which ICTC seeks to enjoin. Brief of Appellee Intercontinental Container Transport Corp., at 17. (Emphasis added.)

[26] 426 F.2d at 887. The court explicitly rejected ILA's and NYSA's claim that the Sherman Act cause of action was preempted by the NLRB's jurisdiction. *Id.*

unanimously found the 1973 rules to be invalid based on a thorough review of the evidence and the history of the industry.

No such thorough review occurred in *Pittston,* the second case cited by petitioners. That case involved narrow issues raised under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("Compensation Act"). As the court of appeals there stated:

> We begin our analysis by remarking on the unsatisfactory state of the records before us. . . . When cases of this nature began coming to the BRB [Benefits Review Board] shortly after the enactment of the Amendments, it should have realized that it was faced with a major task of statutory construction . . . which task could be performed satisfactorily only in the light of an extensive factual background. . . . *The following are illustrative of facts we would like to know but on which these records shed little or no light,* even as regards the port of New York. . . . *Just what is the normal practice for stripping and stuffing containers with goods belonging to different owners or destined to different consignees? Is this work normally done on the pier or in warehouses not adjoining navigable waters?* . . . Instead of developing such a record . . . the BRB has handled each case on an individual basis, and without establishing any record support for the interpretive rules announced therein.[27]

In the face of the court of appeals' inadequate record in *Pittston,* it is inappropriate even to cite that case as precedentially valuable with reference to factual questions arising from the operation of the Com-

[27] A123-A124 (emphasis added; footnote omitted).

pensation Act. When the extensive record developed during the course of the present case is contrasted with that in *Pittston,* the notion that *Pittston* may be advanced as the basis for contradicting the factual findings of the NLRB in this case is patently unacceptable.

In short, the Second Circuit quite properly was unpersuaded by the relevancy of *ICTC* or *Pittston.* Petitioners' argument of conflict based on decisions in the same circuit as the instant case is without logical or legal basis.

CONCLUSION

For the reasons set forth above, the Petitions for Writs of Certiorari in Nos. 76-569 and 76-570 should be denied.

Respectfully submitted,

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